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FAE

CHANCERY PRACTICE

WITH

ESPECIAL REFERENCE

TO THE

OFFICE AND DUTIES

OF

MASTERS IN CHANCERY, REGISTERS, AUDITORS,
COMMISSIONERS IN CHANCERY, COURT COM-
MISSIONERS, MASTER COMMISSION-
ERS, REFEREES, ETC.

INCLUDING

FORMS OF ORDERS OF REFERENCE, MASTERS' REPORTS,
OBJECTIONS, EXCEPTIONS, ORDERS OF CONFIR-
MATION, RECOMMITTAL, ETC.

BY

JOHN G. HENDERSON, LL. D.
OF THE CHICAGO BAR

CHICAGO

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TO

MY FAITHFUL AND DEVOTED LIFE-PARTNER

SARAH ISABEL HENDERSON,

WITHOUT WHOSE AID, ASSISTANCE AND ENCOURAGEMENT

THIS WORK NEVER WOULD HAVE BEEN COMPLETED,

PROMPTED BY AFFECTION AND A SENSE OF

GRATITUDE, THIS, MY FIRST AND LAST

LAW BOOK, IS RESPECTFULLY

INSCRIBED

PREFACE.

In the following pages no attempt whatever has been made at elegance of style, as I deemed it of far more importance to state legal propositions in plain, every-day language, easily comprehended by the average mind, than to present the same in well-rounded periods not so readily understood. There are two different and opposite styles current among law writers, each of which has its admirers and each of which serves a useful purpose, owing to the object of the author and the use intended to be made of his work. One of these is the "condensed style" adopted by Mr. Bishop, notably in his work on Contracts, and also in the later editions of his works upon Criminal Law and Practice, in which legal propositions are stated in the fewest possible words, leaving the student, lawyer or judge to do a large part of the thinking. The other may be termed the "diffusive style," in which legal principles are stated and restated, with illustration after illustration, as if the author suspected that, in spite of his effort, his reader would fail to comprehend his meaning. Whether the one style or the other is preferred depends largely upon the mental character of the reader. The lawyer who repeats, again and again, in his argument to court or jury, will prefer the "diffusive style," while perhaps a far better one, who states his legal propositions in the fewest terms, and without repetition, trusting that they will be as readily understood by his hearers as they are by himself, will be sure to prefer the "condensed style." Unfortunately experience proves that lawyers of the first class are the most successful, not only with juries but with the courts as well, a fact which demonstrates beyond question that the truth of a legal proposition is best impressed upon the mind of the average lawyer or judge by the adoption of the "diffusive style." If all lawyers and judges were gifted with judicial minds, and, therefore, capable of grasping the full force of a legal proposition upon its first presentation, though condensed in the fewest possible words, then, indeed, elaboration would be wholly unnecessary. But, unfortunately, this is not true, which accounts for the fact that, as a rule, the most suc-

cessful lawyers are those who do the most "hammering," not being content with driving the nail into the board, but insisting upon driving it clear through and clinching it on the other side. If this is true of making a legal argument, no good reason can be given why it is not equally true of a text-book intended to be used as an authority in making a legal argument. Acting upon this theory, throughout this work legal principles are stated and repeated, with illustration upon illustration, in a manner calculated to disgust an admirer of the "condensed style." This course is adopted for another reason, which is this: It is intended to be used as an authority in the courts of every state in this country, not because of the legal judgment of its author, but on account of the sources from which its material is derived. For example, a legal principle is given, as laid down by the supreme court of Illinois, and the same rule as stated in Massachusetts, New York, Alabama, and perhaps other states. While the language of each may be quite similar, yet the difference, in most cases, is such as to impress the rule more firmly upon the mind by the repetition, while the lawyer or judge will, of course, give the greater weight to the holding of the court of last resort in his own state, and will use the other decisions cited or quoted, simply as "backers." Not content with this, it will frequently be found that in different parts of this work the same legal proposition, a quotation from the opinion in some reported case for example, is repeated in precisely the same words, thus apparently unnecessarily increasing the size of the book. Such repetitions, however, are not accidental but intentional, it being believed that the busy lawyer would prefer to pay the additional expense incurred by placing the matter in its appropriate connection rather than to be sent, by a cross-reference, on what often proves a "wild-goose chase" for something he is unable to find, or discovers, when found, has no application to the case in hand. Whether this plan is a success or not, or whether a more condensed style would be better appreciated, remains to be determined. Trusting, with this explanation, that my work will receive a fair trial at the hands of my brother lawyers, and hoping that its mission will not be a profitless one, it is submitted to your candid consideration.

JOHN G. HENDERSON.

CHICAGO, ILL., November 15, 1903.

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CHANCERY PRACTICE.

INTRODUCTION.

From one who proposes another book on the subject of Equity Pleading and Practice, certainly the members of his profession have a right to demand some excuse, or at least apology, therefor. With the works of Daniell, Spence, Story, Barbour, Beach, and a number of others at his command, the reader has a right to ask: What is the necessity of another? The answer is simply this: the present work attempts to cover a vast field of equity practice upon which no special work exists. In some of the works referred to, single chapters are devoted to the subject of Masters in Chancery and their duties, and it is also true that in 1824 Hoffman published his "Office and Duties of Masters in Chancery;" and it is also true that in 1831 W. H. Bennett published his work upon "Practice in the Master's Office in the Court of Chancery," republished in this country in 1842, in volume 37 of the Law Library, both of which works were valuable as additions to legal literature at the time of their publication, and are, in the absence of any other work upon the subject, still occasionally found in the lawyer's library.

The present work is not limited to the practice in the master's office after a cause has been submitted to him, but begins with a cause long anterior to its submission, shows what, when and to whom matters will be submitted, the proper preparation of a cause for a reference, followed by an examination of the whole proceedings in the master's office, treating the matter, step by step, until his final report is made and returned into court. The proceedings before the chancellor, on review of the master's findings, are then taken up in their order and followed, step by step, until the entry of a final decree, showing what is necessary to prepare the case for revision in the

upper court. A chapter is then added, showing in detail all the proceedings in the upper court when called upon to revise the action of the master and the chancellor — the preparation of the record, assignment of errors, the making of briefs and abstracts, and final submission of the cause to the court.

This is followed by a chapter upon masters' sales, in which will be found a full statement of the law relative to the subject, together with the method of reporting the same, attacking the report and confirmation thereof. The work is concluded with a full chapter upon master's fees, and compensation he is entitled to for his labor; while throughout the work, in their appropriate places, will be found various forms used not only in the master's office, but in the courts as well. From this meager sketch it will be readily seen that no work of this kind has ever before been attempted.

As a teacher of Equity Pleading and Practice in the Illinois College of Law, I felt the need of a work giving, in a concise form, the origin and early history of the court of chancery, but was unable to find one which would answer my purpose. It became necessary to prepare a course of lectures upon this subject, to be used in the class-room. This course consisted mainly of notes which were used in addressing the class. Convinced that no man can be a good chancery lawyer without a thorough knowledge of this subject, these notes have been elaborated and constitute the first chapter of this work. The necessity of this introductory chapter, in a work of this character, will be readily seen, as no proper conception of the office and duties of the master in chancery can be obtained without a knowledge of the origin and early history of the court, with its many officers and their duties. The early court of chancery was a vast and complicated machine, but one well calculated to perform the duties for which it was created, and of which the master in chancery was but one of the component parts.

Not only is it hoped that the older members of the profession will read its pages with profit, but it is confidently believed that students and the younger members of the bar will derive great benefit from their perusal.

In this historical sketch, an attempt has been made to draw aside the curtain of time and allow the reader to look into the

old court of chancery, as it existed in the days of King Henry VIII. We see the lord chancellor's arrival at the court clothed in crimson satin, and upon his head a "round pillion with a noble of black velvet set to the same, and a tippet of fine sables about his neck," his coming heralded by a sergeant-at-arms, who, with a great silver mace in his hand as a badge of his authority, shouts "Make way for the lord chancellor." We see him take his place upon the bench, while upon either side of him sits a master in chancery, also richly robed, who, as *co-judices*, stand ready to advise him upon weighty questions as they may arise. We look in upon the lord chancellor, upon "Sealing Day," and see him seated in his great marble chair, surrounded by masters in chancery and other officers of his court, whose duty it was to assist him in the authentication of writs and other documents, attaching the great seal, the mystic emblem of his own authority, delivered into his keeping by the king at the time of his creation as lord chancellor; or, again, we see the lord chancellor on state occasions parading the streets of London with a great retinue of attendants at his heels, himself perched upon a mule "trapped with crimson velvet upon velvet, and his stirrups of copper and gilt," his sergeant-at-arms with his great silver mace before him making way for his lordship, while attendants carried before him, "two great crosses of silver, two great pillars of silver, the great seal and his cardinal's hat." We see the king's subjects with heads uncovered gaping at this show of pageantry, while it is said that even "the Judges ducked their reverend heads to his Eminence as he passed by." Spear and helmet, sergeant's mace, the cardinal's hat and the cardinal too, are gone,—gone like a "ghost at cock-crowing," all "vanished into thin and airy nothingness;" but we have left to us as a heritage the grandest system of remedial jurisprudence ever devised at the hand of man!

The office of master in chancery is an ancient one; indeed, it may be safely said that it is as old or older than the court itself; that is, masters were appointed by the king, and discharged duties connected with the office of lord chancellor, long before the chancellor himself had any independent equity jurisdiction. They were appointed by the king, held their office during life, or at least during the pleasure of the king; were

members of the royal household, and, as a part thereof, migrated with the same from place to place, about the kingdom, as necessity required. They were men of profound learning, trained from their youth up with especial reference to the discharge of the duties of their office, and well skilled in Latin and in the "Chauncerie writing." Their knowledge of the civil law was great, as well as that of the common law, and they were well calculated to aid the lord chancellor with their advice, two of them, selected by rotation, sitting with him upon the bench every morning for that purpose. The origin and history of references are shown with the bitter opposition which the practice met with, upon the part of the people, when first introduced. It is further shown that, such references proving of great convenience and assistance to the court in the discharge of its duties, gradually became more frequent, until, eventually, they became the principal business of the master's office.

Together with the great body of equity jurisprudence, our forefathers brought with them the office of master in chancery as it existed in the mother country; and, although the office of master has long since been abolished in England, it still exists under that name in the federal courts, and in many of the states, as in Florida, Illinois, Maine, Mississippi, New Jersey, Pennsylvania, South Carolina and Vermont. In other states the office of master still exists, but under a different name; for example, in Tennessee and Arkansas under the title of "Clerk and Master;" in Indiana, Kentucky and Ohio under that of "Master Commissioner;" in California and Michigan under that of "Court Commissioner;" in Virginia and West Virginia under that of "Commissioner in Chancery;" in Georgia under that of "Auditor and Master;" in New Hampshire under that of "Auditor;" in Alabama under that of "Register in Chancery;" while in the code states, generally, the law provides for "Referees," who, under the practice, discharge the same duties in equity causes as masters in chancery. But, by whatever name they are known, the fact is that, in case of references, their duties are essentially the same, that is, to hear evidence, ascertain facts, and report their conclusions of both law and fact to the court as a basis for further action. Indeed, it may be safely said that the courts of almost every state in the Union have the power, sometimes with the consent of parties,

and in other cases without their consent, to refer certain matters involved in litigation to some ministerial officer for hearing, who, for the time being, takes the place of the court, hears the evidence, finds the facts, draws the legal conclusions, and reports the same to the court, at the same time advising what the decree should be. The matter referred may be a single question or it may involve the whole matters in controversy. The amount of labor performed by them is simply enormous — far greater in many cases than that performed by the court itself.

When we consider the nature and character of the cases that are usually submitted to masters in chancery, we are prepared to appreciate the importance and responsibility of the office. Millions of dollars pass through their hands yearly, resulting from sales of property in litigation. Complicated questions of law and fact are referred to them, upon the correct decision of which vast amounts of property depend, and, in many cases, their decisions are practically final; as, in determining questions of fact, where the witnesses are before them, and the testimony conflicting, it requires a strong showing to justify the court in setting aside their findings. They are frequently called upon to try cases which cannot, from their very nature, be tried in court, simply because few courts, if any, have sufficient time to devote to their hearing and consideration. In but few instances does the report of a case give any idea of the vast amount of labor performed by the master. The result of the master's labor finds its way into the decree. His report, the result, sometimes, of months of laborious work, is entombed in the record, and the only notice frequently taken of it is the statement of the fact, that "the cause was referred to the master, to take the testimony and report his conclusions."

It not infrequently happens that no one outside of the counsel employed in the cause ever has an opportunity to understand the amount of labor necessary upon the part of the master in case of a reference. Even the witnesses, after giving their testimony, go about their business, leaving the counsel of the respective parties, alone in the master's office, there to complete what, in many cases, turns out to be the most laborious part of the work. After the argument is closed, the

master, alone in his office, is left to make up his findings of fact and formulate his conclusions of law — a task that not infrequently requires months of patient toil in its completion. In many cases it turns out that the result of his painstaking labor is never questioned by either party, but accepted by both as a finality, and a decree entered accordingly. Hon. E. B. Sherman, master in chancery of the United States circuit court for the northern district of Illinois, furnishes us with a case illustrating the truth of this last remark.

“In the case of the Charter Oak Life Insurance Co. v. Cook County Nat. Bank, a bill was filed in the circuit court of the United States for the northern district of Illinois, alleging that the complainant was the assignee of Allen, Stephens & Co. of New York, and, as such assignee, that it was entitled to a dividend out of the proceeds of the defendant bank in liquidation. Over two years had been employed in taking testimony in a case involving the same issues in the circuit court of the United States at Des Moines, Iowa, and by stipulation this testimony, so far as it was pertinent to the issues, was to be considered upon the hearing of the cause in Chicago. This testimony covered 4,500 printed pages, involving many long and complex statements of account between Allen, Stephens & Co. and the defendant bank. In fact, the case involved half a dozen complicated chancery causes combined in one. The amount involved was about three quarters of a million dollars. The case came on for hearing before Judge Drummond, and several days were spent in argument. The issues were so many and complicated that it became evident both to the court and counsel that the trial of the case would necessarily occupy months, and thereupon the cause was referred to a master to hear and report his conclusions of law and fact. The counsel employed were some of the most eminent lawyers at the Chicago bar, assisted by an eminent attorney of Hartford. The oral argument alone occupied about two weeks, and elaborate printed briefs were submitted. The master gave several months of careful scrutiny and study to the cause, and in his report condensed all the pregnant facts and figures and his conclusions of law into eighty printed pages. His decision was so carefully considered and strongly stated, that no objections were ever filed thereto. During the prog-

ress of his work upon the case the master consulted with Judge Drummond as to the question of comity between different courts considering the same questions upon the same evidence, and other points involved in the cause, and received from that distinguished jurist this injunction:

‘Go to the bottom of the case, employ your own methods of investigation, arrive at your conclusions uninfluenced by what any other court may have done or said in the premises. In a case involving so many complicated issues as this, the responsibility of a just decision must rest upon the master; he alone can devote the time and study necessary to a thorough understanding of the whole case.’ ”

If this work is not as perfect as the reader has a right to expect, the fault is mine and mine alone. I shall not attempt to excuse its imperfections with the hackneyed excuses usually put forward — want of time, opportunity, or want of access to the necessary sources of information. I here admit that I have had at my command ample time, and that I have encountered no obstacles other than those which are usually met with in such undertakings. The work is as perfect as I am capable of making it. I am conscious of the fact that its faults are many, and I simply reserve the right to correct the same, when pointed out, in a future edition, should one be called for. Surely this is a right which every author is entitled to. Of the learned and indefatigable Spelman, it is said by Wilson, that “after all the immense researches, which enabled him to prepare and publish his Glossary, he published it with this remarkable precaution: ‘under the protestation of adding, retracting, correcting, and polishing, as, upon more mature consideration, shall seem expedient.’ ”

It is said by Lord Bacon that “every man is a debtor to his profession, and ought of duty to endeavor to be a help thereunto.” This debt I have attempted to faithfully discharge, at the same time being free to admit that, long before I completed my task, I realized the full force of the remark made by the historian Gibbon, that “a book takes more time in making than a pudding,” and will add that if I had dreamed that it would have required a quarter of the labor expended upon it, to complete it, it never would have been undertaken — in other words, the debt would have been left unpaid.

More than five years of patient, almost constant, labor were

INTRODUCTION.

~~superfluous~~ : ~~is collecting~~ material before an attempt was made ~~to arrange a single~~ chapter of the text. It has been my aim ~~to collect~~ ~~cases~~ in support of the text, or, at least, ~~my own cases~~, after a careful examination, were found to be ~~correct~~ ~~in point~~. The haphazard method of copying cases from ~~various~~ ~~opinions~~ of the courts, foot-notes of other text-books, ~~or other sources~~ without knowing whether they are relevant or ~~not~~ ~~and~~ without even verifying book or page, or even the orthography of proper names, has been carefully avoided. It is always ~~a source~~ of great disappointment to the busy lawyer, when ~~he finds~~ a principle stated in the text-book precisely in point, ~~or turning~~ to the case as cited in the foot-note, to find, ~~perhaps~~ the subject under investigation not even mentioned.

The undertaking is certainly a laudable one, and whatever ~~may be~~ the result of my effort I console myself with a thought ~~or~~ ~~is~~ expressed by Dr. Barrow in one of his sermons: "He ~~that~~ ~~aspireth~~ after worthy things, and assayeth laudable designs, ~~pursuing~~ them steadily, with serious application of heart and ~~minute~~ activity, will rarely fail of success; and *if he should happen to fail in his design, yet he will not lose his credit; for, having meant well and done his best, all will be ready to excuse, and many to commend him.*"

My labor now ended, I look back over the field with satisfaction for more reasons than one, — first, I have learned much in regard to the origin, history and practice of the court of chancery that otherwise I never would have known; second, the investigation of the various subjects found in this work has been a source of pleasure and profit; and, lastly, it is a pleasing thought that I have here brought together a large amount of law, arranged in convenient form, and that my labor will surely be appreciated by my brother members of the bar, and that, whatever fate awaits my work, some at least will derive profit therefrom; and I now lay down my pen with the hope that what I have here collected from the books, and culled from my own experience, will be found a convenient handbook by the busy, over-burdened members of my profession, and that those who have occasion to consult its pages may do so with at least a portion of the pleasure which its compilation has afforded me.

CHAPTER I.

ORIGIN AND EARLY HISTORY OF THE COURT OF CHANCERY.

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I. NECESSITY OF STUDY.

§ 1. We must know something of the origin and history of the court.—To many the subjects treated in this chapter may seem to be more curious than useful, and to such it may be necessary to offer an apology. It must be remembered that these matters are not only curious as history, but that they also serve to give us a proper understanding of and serve to illustrate the powers and duties of the masters in chancery of the present day. We must know something of the origin of the court of chancery, as we can, as is well said by Burroughs, “by observing the progress it made in business and power, judge better of the use of the masters therein, what functions they held, and the grounds and reasons on which their rights do depend.”¹

It is trusted that the subject of this chapter, set out somewhat in detail, will be considered a fitting and appropriate introduction to the more practical matters found in the succeeding pages, and that we may hope that the learning of these ancient masters in the law, and their dignity, secured by

¹ Burroughs, Hist. Ch. (1726), p. 44.

a life tenure in office, thus placing them above and free from the tricks and schemes of the modern office-seeker, whose appointment and continuance in office alike too often depend on his influence in the "primaries," may excite emulation in those who are called upon to discharge the duties of a master in chancery, who, indeed, as it has been said, is the "hand of the court."

While many of the powers of these ancient masters depended on statutes that long since have been repealed, and of others they have been deprived by special legislation, and others have become obsolete by mere course of time, or changed conditions, yet the majority of the duties enjoined upon them under the old English practice are, or may still be, performed by their modern successors. No naturalist can have a proper conception of animal life upon the globe to-day without a knowledge of the fossils embedded in the rocks, and, as in the physical world, so in the moral and social, the present grew up out of, and is intimately connected with, the past, and it is only by contemplation and study of the past that we are able to fully comprehend the present.

§ 2. We must know something of the origin and history of the court — Continued.— No proper conception of the office and duties of a master in chancery can be had apart from the history of the court itself. The history of the office is indissolubly connected with that of the court of which he was and still is an officer. Out of the past the present is evolved. As said above, no student of animal life, as found upon the globe to-day, could ever hope to attain anything but a most superficial knowledge of his subject unless he extended his researches to that of extinct species, whose fossil remains are entombed in the rocks and preserved in museums, and the descriptions of which are found in the works of distinguished scientists who have devoted their lives to their study. To understand the family *equidæ*, or horse family, as found to-day, we must extend our investigations to that of the fossil horse found in the *Mauvaisterres* of Nebraska. In the animal economy many things are found which appear to be absolutely unaccountable, but which, when studied in connection with remote forms of the past, are found to be but the "standing over" of some organ that once was useful to the individual or

essential to the existence of the species. As in the physical world so in the moral and social. Language, customs, habits, civilization itself, by the slow process of evolution, have been brought to what we see about us. What is true of these is equally true of the law. Centuries ago a rule was laid down by the king, the court, or by the legislative body. As the altered conditions of society required, or seemed to require, modifications of this rule, it was limited, extended, or exceptions to it recognized, and thus the rule itself altered, until to-day it is only possible by the examination of intervening links to establish the connection between the law of to-day and its remote progenitor. This linking the present with the past as we see it to-day enables us to understand the connection that will just as surely exist between the present and the future. The law student of the thirtieth century will be poring over the musty volumes of our time, where he will find many things, now cherished by us, which then will have become obsolete, and the study of which then will be only profitable as matters of history, or as enabling the student of that day to properly understand the connecting links between the law as it will then exist and that of to-day, as well as that of the intervening centuries.

§ 3. Evolution of the law — The present and the past.—Modern geology demonstrates that by slow processes of upheaval the mountains were elevated and great valleys formed, and by just as slow and sure processes, wind, rain, frost, ice, snow and other means of disintegration, the loftiest peaks are being torn down, while the rivers are busy carrying their substance into the ocean itself. By these silent agencies the elevation of continents is being diminished and the depths of the ocean lessened. As we look upon them to-day, nothing seems more stable than the "everlasting hills," and it is only by comparisons made between conditions separated by long intervals of time, and by close observation of the silent forces ever busy in their destruction, that we realize the fact that they too are bending before these agencies, and are as changeable in fact as the flower that blooms and wilts upon their slopes, the difference being only in the length of time required to complete their destruction. What is true of the physical world is also true of the social world. Laws, language, customs, habits are

never at a stand-still, but the eternal law of change is ever busy tearing down, moderating, altering and modifying. By comparisons made between conditions existing at intervals far asunder, the extent of such changes is forcibly presented to the mind. The language of Chaucer's time is almost obsolete to-day, while the customs of the English people of the time of Edward the First are almost as different from the customs of their descendants of to-day as from those of the North American Indian whom the latter have displaced on this continent.

Especially do we find this law of change to be applicable to law itself. Speaking of the gradual changes in the law effected by time, Sir Mathew Hale says: "And as this is most clear in all lawes, so in our English lawes we shall find what was in use, and possibly very effectual in its time, is now deserted and antiquated, and utterly unapplicable to the present state of administration in England. Glanville wrote a system of our English lawes in the time of Hen. 2. Bracton in the time of Hen. 3. Britton in the time of Ed. 1. Let any man read them, and see, whether he can by any means accomodate that administration to the present state of things, or the present regiment or order of things to that. Nay, if we come to the year-books of the time of Ed. 3. any man, that knows anything in this kind, will most certainly find, that it cannot fit us; for where is there now one assise or real action brought, unless where they have no other remedy? So that the stream of things have, as it were, left that channell, and taken a new one; and he, that thinks a state can be exactly steered by the same lawes in every kind, as it was two or three hundred years since, may as well imagine, that the cloaths that fitted him when he was a child should serve him when he is a grown man. The matter changeth the custom; the contracts the commerce; the dispositions, educations and tempers of men and societies change in a long tract of time; and so must their lawes in some measure be changed, or they will not be usefull for their state and condition. And besides all this, as I before said, time is the wisest thing under heaven. These very lawes, which at first seemed the wisest constitution under heaven, have some flawes and defects discovered in them by time. As manufactures, mercantile arts, architecture and building, and

philosophy itself, receive new advantages and discoveries by time and experience; so much more do laws, which concern the manners and customs of men.”¹

II. METHOD OF WORK.

§ 4. Authorities relied upon and method of work.—Throughout this work I have preferred transcribing literally from works of unquestioned authority, as well as from opinions of courts, such material as suited my purpose, instead of attempting to restate, in my own language, the substance of the same. The former course appears preferable for several reasons. First, it seemed to me far more satisfactory to the reader to have before him the exact language of the authority relied upon, rather than an attempt at paraphrasing the same; for it is well known that often a writer, in attempting to restate the substance of a paragraph in his own words, fails to present the meaning of his author, or, in other words, upon examination it is found that the authority cited does not support the text. Second, the language used in the original, in most of cases, is far superior to anything of my own which I might have substituted therefor. Third, in many cases the authorities cited are inaccessible to the average reader, and to such the course here pursued certainly is far more satisfactory. Fourth, to the few readers to whom the authorities relied upon are attainable, most of them would prefer a quotation rather than an original statement with a citation, because of the labor and time thereby saved. Fifth, I can only rely on my own personal taste in this matter, and it may be that the course here pursued, while it is the one best suited to my own mental make-up, may yet be condemned by the majority of those who may have occasion to use my work. Let it be distinctly understood that no attempt is made at originality, except in the arrangement of material, and no merit is claimed except that of laborious research for material, and the careful collation and faithful transcription of authorities. I have endeavored in every instance to acknowledge the source from which material is obtained, and to carefully indicate by quotation marks, or otherwise, that which is simply reproduced; and this

¹ Hargrave's Law Tracts, 269, 270.

for a double reason, namely, to ~~increase~~ its value and to place responsibility where it properly belongs. Undoubtedly these suggestions would have found a more appropriate place in the preface; but, for the reason that, as a rule, prefaces are only read by the printer and proof-reader, attention is called to them in the text. Any student knows that, in the investigation of a subject like this, one will find, in works written centuries ago, the statement of a legal principle, or an historical fact, and the same principle or fact, in precisely the same language, repeated over and over again by succeeding authors, frequently without giving, or perhaps knowing, its original source, and that in this manner it may become so familiar that in using it the writer may be unconsciously exercising the memory rather than the power of invention. For this reason I may have, in some cases, failed to give proper credit in the following pages where credit should have been given, but, in no case, have I intentionally omitted so to do. In justice to myself I will add that every authority cited, unless otherwise noted, has been personally examined. In some cases, because of the fact that the books were inaccessible, I have been forced to content myself with the citation at second hand, but in each instance I have noted such fact.

III. ORIGIN OF NAME.

§ 5. **Origin of the terms chancellor and chancery.** The name of the court, Chancery (*Cancellaria*), is derived from that of the presiding officer, Chancellor (*Cancellarius*), an officer of great distinction, whose office may clearly be traced back before the Conquest, to the times of the Saxon kings, many of whom had their chancellors. Lord Coke supposes that the title "*Cancellarius*" arose from his canceling (*a cancel-lando*) the king's letters patent when granted contrary to law, which is the highest point of jurisdiction.¹

But the office and name of Chancellor, Mr. Justice Blackstone has observed, was certainly known to the courts of the Roman emperors, where it originally seems to have signified a chief scribe, who was afterward invested with several ju-

¹Story, Eq. Jur., § 40; 4 Inst. 88.

dicial powers, and a general superintendency of the officers of the prince.¹

Judge Story says: From the Roman emperors it passed to the Roman Church, ever emulous of imperial state; and hence every bishop has to this day his chancellor, the principal judge of his consistory. And when the modern kingdoms of Europe were established upon the ruins of the empire, almost every state preserved its chancellor, with different jurisdictions and dignities, according to their different constitutions. But in all of them he seems to have had the supervision of all charters, letters, and such other public instruments of the crown as were authenticated in the most solemn manner; and therefore when seals came in use he always had the custody of the king's great seal.²

The word *chancel* is still applied to the "inclosed space in a church surrounding the altar, and railed off from the choir; the sanctuary. In small churches having no separate choir, the altar-rails (and in some churches the screen or lattice-work) divides the chancel immediately from the body of the church."³

Camden tells us that "The *chancery* takes its name from *chancellor*, a title of no great honor under the old Roman emperors, as we learn from Vopiscus. The name and office of chancellor was copied from the Cæsarean palace into most of the states of Europe, and became characterized by many splendid additions; such were those of *nomophylax*, *asylum juris*, *ara boni et æqui*, *vicarius regis*, *prorex*, *interrex*."⁴

§ 6. Origin of the terms chancellor and chancery — Continued.— Camden further tells us that "At present, it is the name of the greatest dignity, and the place of chancellor, the highest honor in the state. Cassiodorus derives it from the word *à cancellis*, i. e. *rails*, or *balisters*, because they examine matters in a private apartment enclosed with rails, such as the

¹Story, Eq. Jur., § 40, citing Parkes, Hist. Chan. 14; 1 Wooddeson, Lect. vi, p. 160; Hist. of Chancery (1726), 3, 4.

²Story, Eq. Jur., § 40, citing 3 Black. Com. 46, 47; 1 Wooddeson, Lect. vi, pp. 159, 160; 1 Collect. Jurid. 25; Parkes,

Hist. Chan. 14; 1 Reeves, Hist. 61; 2 Reeves, Hist. 250, 251.

³Century Dic., verbo Chancel; Rapalji and Mack's Law Dic., verbo Chancel.

⁴Vopiscus, quoted 1 Wooddeson's Lec., p. 161.

Latins called *cancelli*. Consider, says he, by what name you are called. What you do within the rails cannot be a secret: Your doors are transparent, your cloysters lie open, your gates are all windows. Hence it plainly appears that the chancellor sat exposed to every one's view, within the rails or cancels; so that his name seems to be derived from them. Now, it being the business of the minister (who is the *mouth*, the *eye*, and the *ear*, of the prince) to strike or dash with cross lines, lattice-like, such writs or judgments as are against law or prejudicial to the state, which is not improperly called *cancelling*; some think the word *chancellor* was deduced from thence: And thus we find in a modern glossary: *A chancellor is he, whose office is to inspect the writings, answers and orders of the Emperor; to cancel those that are wrong, and sign those that are right.* Nor is that of Polidore Virgil true, namely, *that William the Conqueror instituted a college of scribes to write letters-patents; and named the Master thereof, CHANCELLOR*; for it is evident that *Chancellors* were in England before the Conquest.”¹

Wooddeson says: “This term ‘*cancellarius*’ had originally no connection with courts of justice, or the cancelling of instruments: it first occurs in Vopiscus: but one of his commentators thinks it was of much earlier use, though not in the same sense. The denomination certainly at the first was of humble import, signifying those ushers, who had the care of the ‘*cancelli*,’ or latticed doors, leading to the presence chamber of the emperors and other great men, and were to admit or repel all comers, and to prevent riot or disorder. . . . From their original situation the Roman *cancellarii* became secretaries or scribes to the emperors and principal judges.”²

However, antiquaries differ much as to the origin of the word “chancellor.” Some derive it “*a cancellis*,” or lattice doors, and hold that it was a denomination of those ushers who had the care of the “*cancelli*,” or latticed doors, leading to the presence-chamber of the emperors and other great men.”³

Because of the power vested in the lord chancellor of repelling or annulling patents Lord Coke says: “Hereof our lord chancelour of England (for forein chancelours, it may

¹ Camden, *Britannia* (2d ed.), vol. 1, col. cclv.

² Wooddeson's *Lectures*, 150.

³ Story, *Eq. Jur.*, § 40, note.

be, have not like authority) is called *cancelarius*, *à cancellando*, i. *à digniori parte*, being the highest point of his jurisdiction to cancell the king's letters patent under the great seale, and damming the inrolment thereof, by drawing strikes through it like a lettice."¹

Lord Chancellor Gardyner, in the reign of Queen Mary, presiding on the woolsack, in the sight of all the Lords, cut from a bill certain clauses to which the Commons dissented, and said: "I now do rightly the office of a chancellor."²

§ 7. Origin of the terms chancellor and chancery — Continued.— Whether the word "*chancellor*"— Latin "*cancellarius*"— is derived from "*cancellare*" or "*cancelli*,"— "from the act of *cancelling* the letters patent when granted contrary to law, or from the *little bars* used for fencing off from the multitude the recess or chancel, in which sat the doorkeeper or usher of a court of justice," we may not be able to determine, but certainly the great probability, as well as weight of authority, is in favor of the latter; and we may safely hazard the opinion that Lord Chancellor Gardyner intended only a well turned sentence by a play on the word "chancellor," or that he used that word without any reference whatever to its etymology. This opinion is fortified by the great name of Gibbon, who says that the chancellor, as "doorkeeper or usher of the court, who, by his *cancellæ* or little bars, kept off the multitude from intruding into the recess or *chancel* in which he sat," and that "this word, so humble *in its origin*, has by a singular fortune risen into the title of the first great office of state in the monarchies of Europe."³

Other names applied to officers of the law, connected with the administration of justice, derive their origin from physical objects in the court room. Thus we speak of the court as the *bench*, because the judge anciently sat on a bench the inconvenience of which sometimes was relieved by a *woolsack*— a name almost synonymous with chancellor. Woolsacks are said to have been introduced into the House of Lords as a compliment to the staple manufacture of the realm, says Lord Campbell; "but," he adds, "I believe that in the rude sim-

¹ 4 Coke, Inst. 87, 88.

³ Campbell, *loc. cit.*, pp. 2, 29.

² Campbell's Lives of Ld. Chancellors, vol. 1, pp. 1, 2, and note.

plicity of early times a sack of wool was frequently used as a sofa — when the judges sat on a hard wooden BENCH, and the advocate stood behind a rough wooden rail, called the BAR.”¹ The lawyers as a body are spoken of as the *bar*, and individuals as members of the *bar*, from the bar or rail that anciently separated them from the spectators in the court room.² Other similar illustrations might be cited; for example, we address the presiding officer of a deliberative body as the *chair*, and, in announcing his rulings, he gravely speaks of himself in the third person as “the chair.”

IV. THE LORD CHANCELLOR.

§ 8 The lord chancellor — Origin and antiquity of his office. — Freeman,³ writing of the chancellor, tells us: “He first appears in England by that name in the reign of Edward, but his name and office had been familiar on the continent since the days of the first Karlings. Indeed his office, under some title or other, must have been a matter of necessity everywhere. The lord high chancellor of later times, the highest judge in equity, the speaker of the House of Lords, the proverbial keeper of the king’s conscience, arose from more lowly beginnings than any other of the great officers of the state. In his first beginnings, if the king’s conscience was in his keeping, it was in his character as king’s chaplain, head of the king’s chaplains, head of a trained body of men by whom all letters, writs, and accounts, in all branches of the king’s immediate administration, were written and kept. The lowly beginnings of the office are marked by the name being freely applied to other officers who were not in the royal service. The king had his chancellor, as he had his steward, or any other officer of his court or household. But the bishop had his chancellor also, and the name has attached itself to two wholly distinct ecclesiastical officers, to the chancellor of the diocese, the judge of the bishop’s court, and to the chan-

¹ Ld. Chs., vol. 1, p. 16, note.

² In a similar way the word *bar*, originally a rod or rail, came to be applied to persons connected with the administration of justice, and even to the court itself; thus we speak of “members of the bar,”

meaning members of the legal profession, those entitled to sit within the bar; also the “case at bar,” that is the case before the court. Century Dic., verbo Bar.

³ Norman Conquest, vol. 5, p. 290.

cellor of the church, whose place was to stand at the head of education in the cathedral church and the diocese. Out of this last office grew another kind of chancellor, the chancellors of the universities, whose office, also from lowly beginnings, has risen in dignity, if not in power, almost to a level with the royal chancellor himself. But the greatness of the chancellor belongs to a later time than that with which we are now dealing. The days when the chancellorship could add fresh dignity to a bishop, or even to a primate of all England, were yet to come. The chancellor of the Norman reigns is a churchman, who looks forward to a bishoprick as the reward for his services; but it is thought unworthy of a bishop to accept, or even to keep, a post so much beneath his rank."

Nelson says, in the preface to his reports: "In former ages, and until the fall of Cardinal Wolsey, the lord chancellor of England was usually a bishop, or some other ecclesiastical person, as a *dean* or *archdeacon*; and sometimes the great seal was delivered to one of the king's chaplains, insomuch that the learned Glossographer tells us, there have been 160 clergymen advanced to this dignity; and that until the 26th year of the reign of King Henry the Eighth, all the masters of the rolls were churchmen."¹

Lord Coke says: "Certain it is, that both the Brittish and Saxon kings had their chancelors and court of chancery, the only court out of which originall writs doe issue."²

Anciently the chancellor was often designated by the Latin term *custos magni sigillis*, or keeper of the great seal.³

"Chancellor and Keeper of the Great Seal seemed but different words or titles to express the same office; for by 5 Eliz., c. 18, their office and power are declared to be in all respects the same."⁴

Again it is said that the chancellor and *custos sigilli* anciently were one officer,⁵ though they have been sometimes divided since the time of Henry II.⁶

But Lord Campbell tells us that: Anciently the chancellor and "keeper of the great seal" were not one and the same

¹ Nelson's Ch. Reports (1717), Pref-
ace.

² 4 Inst. 78.

³ Choyce, Cas. in Ch. (1652), p. 58.

⁴ Wyatts' Pr. Reg. Ch. 102.

⁵ 2 Comyn's Dig. 207.

⁶ Id., citing Seld. Off. Ch., 4, and 1
Rol. 385, l. 25, etc.

person. Lord Campbell says that in the reign of Richard I. we have the earliest distinct evidence of the existence of the officer connected with the great seal, called indifferently "*custos sigilli*," "*sigillifer*," and "*vice-cancellarius*," but in all probability the office was long before well known. It has been usual to consider the great seal as inseparable from the person of an existing chancellor, and that the "keeper of the great seal," from the remotest antiquity, exercised all the functions of the chancellor under another title; but as we shall see, for many ages to come there were often concurrently a chancellor and a "keeper of the great seal."¹

The origin of the word *chancellor* has necessarily been considered in connection with the term "*chancery*" and there remains nothing to be added upon the subject in this place.²

§ 9. **His appointment.**—The Lord Chancellor hath no Commission by Letters Patents, nor is he created by Writ, like all the other Judges; but receives his Authority only by the Delivery unto him of the Great Seal of England by the King himself.

When he hath received the Seal from the King, there is an Entry made, upon a Close Roll in the Court of Chancery, what Day, and in whose Presence, the Great Seal was delivered; and other Grant or Patent for that Office there ought not to be, for that the Person to whom the Office is committed hath the Keeping of the Great Seal in his own hand:

The Lord Chancellor holdeth his Office but at Will, *durante beneplacito Regis*.³

The entry upon the *Close Rolls*, made upon the delivery of the Great Seal to the Chancellor, having been mentioned, for the gratification of the curiosity of the reader, a translation of one is here given made by Lord Campbell, the original being in Latin and entered upon the occasion of the transfer of the Great Seal from Lord Chancellor Warham to Cardinal Wolsey:

"Be it remembered that on Sunday, the 22nd of December,

¹Ld. Chs., vol. 1, 114. The same term "*vice-cancelarius*" was at a later period applied to the master of rolls, because he relieved the chancellor of a part of his judicial duties; hence the name is not to be confounded

with the same term as applied to the "keeper of the seal." See *post*, § 14.

²See *ante*, §§ 5-7.

³Prax. Can. 5, 6; Wyatt's Pr. Reg. Ch. 101, 102.

in the seventh year of the reign of Henry VIII. (1515), about the hour of one in the afternoon, in a certain high and small room in the King's palace at Westminster, near the Parliament Chamber, the Most Reverend Father in Christ, William Archbishop of Canterbury, then Chancellor of England, the King's Great Seal in the custody of the said Chancellor then being enclosed in a certain bag of white leather, and five times sealed with the signet of the said Archbishop, into the hands of our said lord the King surrendered and delivered up in the presence of the Most Reverend Father in Christ, Thomas by Divine compassion Cardinal Priest of the Holy Roman Church, by the title 'Sancti Ariaci in Termis,' Archbishop of York, Primate of England, and Legate of the Apostolic See, of Charles Duke of Suffolk, and of William Throgmorton, prothonotary of the Chancery of our Lord the King. And our said Lord the King, the said seal in the said bag so inclosed, so surrendered and delivered up by the said Archbishop, then and there caused to be opened and taken out, and being opened and taken out, saw and examined the same. And our said Lord the King then immediately, in the presence of those before mentioned, caused the said seal to be again inclosed in the said bag, and the said seal inclosed in the said bag, sealed with the signet of the said most reverend Cardinal, delivered to the said most reverend Cardinal, to be by him kept and used by the said most reverend Cardinal, whom he then and there constituted his Chancellor, with all diets, fees, profits, rewards, robes, commodities, and advantages to the office of Chancellor of England of old due, belonging or appertaining, and the said most reverend Cardinal the said seal, in the presence of the persons before mentioned, then and there received from the aforesaid most invincible King."¹

"Upon the death of the Chancellor of England, three Great Seals, one of gold and the other two of silver, which were kept by the Chancellor, are, immediately after his decease, locked up in a wooden chest, and sealed by the Lords present, and so conveyed into the Treasury. From thence they are brought to the King, who in the presence of the nobility delivers the same into the hands of the succeeding Chancellor (having taken

¹ 1 Lives Ld. Chs., pp. 424, 425, note, citing Rot. Cl. 7 Hen. 8, m. 1.

an oath before him, that he will well and faithfully administer that office;) first, the great silver seal, next that of gold, and lastly, the other silver. After he receives them he puts them into the chest again, and sends them home sealed with his own seal; where, before certain of the nobility, he causes the King's Letters-patents and Writs to be sealed with them."¹

So too when a chancellor is discharged he delivers up the three seals into the king's hands, in presence of his nobles; first, the seal of gold, then the broad seal of silver, and next, the other silver one of less size.²

Lord Coke says that the form of conferring the office of chancellor was by suspending the great seal round the neck of the person appointed.³ Lord Campbell says that he was induced to make this statement by an occurrence related by Hoveden, "that while Longchamp, the chancellor, remained in England to administer the government, Malchien, as vice-chancellor, attended Richard in Sicily, on his way to Palestine, and was afterward drowned near Cyprus, having the great seal suspended round his neck."⁴ Yet Lord Coke may be right, for Camden says that "the manner of making a Chancellor was, in Henry the II's time, by hanging the *Great Seal* about the neck of the person chosen to that office."⁵

§ 10. **His authority and duties.**—From the reign of the Conqueror the office of chancellor has descended in regular succession. Down to a comparatively late period the chancellor was generally, if not always, an ecclesiastic, who was also a member of the royal household, and on a footing with the great dignitaries. He was the most dignified of the royal chaplains, if not the actual head of that body. The whole of the secretarial work of the household and court fell on the chancellor and chaplains; the keeping of the royal accounts under the treasurer and justiciar, the drawing up and sealing of royal writs, and the conducting of the king's correspondence. The chancellor was, in a manner, the secretary of state for all departments.⁶

¹ Camden, *Britannia* (2d ed.), vol. 1, col. cclvi.

² Camden, *Britannia* (2d ed.), vol. 1, col. cclvi.

³ 4 Inst. 87.

⁴ *Lives of Lord Cha.*, vol. I, pp. 114, 115.

⁵ *Britannia* (2d ed.), vol. 1, col. cclv.

⁶ 1 Stubbs, *Const. Hist.* 852.

Besides the judicial duties devolving upon him as the chief presiding officer of the court of chancery, there were, as we have already seen, many others required of him, some of which, because of their importance and the splendor, pomp and ceremony attending them, enhanced the dignity of his office. Among the most important of these duties was that of the installation of the judges of the common-law courts. From an old author the following description is taken:

“As often as any place of judicature is void the King useth to chuse one of his Serjeants at Law, and him by his Letters Patents to ordain a justice in that place, and then the Lord Chancellour shall enter into the court where the Judge is so wanting, bringing with him those Letters Patents, and sitting in the midst of the judges, causeth the Serjeant so elected to be brought to the bar of the court, to whom in open court he notifieth the King’s pleasure of electing of him to the place that is void, and causeth the aforesaid Letters to be openly read and published, the which done, the Clerk of the Rolls¹ (but now of latter practice the Clerk of the Crown) shall read before the same elect person the Oath that he shall take, which when he hath sworn upon the Gospel, the Lord Chancellor shall deliver unto him, the King’s Letters Patents aforesaid.”²

As an example of the pomp and ceremony I add the description of the solemn installation of Henry Montagu, the successor of Lord Coke, who had been spitefully removed from that office by the king. The ceremony was preceded by a grand procession from the Temple to Westminster Hall: “First went on foot the young gentlemen of the Inner Temple; after them the barristers according to their seniority; next the officers of the King’s Bench; then the said Chief Justice himself, *on horseback, in his robes*, the Earl of Huntington on his right hand, and Lord Willoughby of Eresby on his left, with above fifty knights and gentlemen of quality following.”³ Having entered the court, Lord Chancellor Ellesmere seated on the bench, delivered to him the writ by which he was constituted Chief Justice and then proceeded to deliver to

¹ Master of the Rolls.

Chief Justice of England, Feb. 1, 1621.

² Choyce, *Cas. in Ch.*, Preface, p. 59.

² Campbell’s *Ch. Justices of England*, p. 18.

As a sample of such ceremony see the installation of Sir James Ley, as

³ *Id.*, p. 7; *Dudg. Or. Jud.*, p. 98.

him a highly complimentary address upon the duties of his office, in which he took occasion to give Lord Coke, the ex-Chief Justice, a back-handed lick. To this the new Chief Justice replied in a few appropriate remarks, took the oath of office, mounted the bench and was placed in the seat of Chief Justice.

Upon the installation of the common-law judges the chancellors often took occasion to give excellent advice as to the discharge of their official duties. We have only room for the following extract from Lord Bacon's counsels to Justice Hutton when the latter was called to be a judge of the common pleas. Among other things he said:

"Draw your learning out of your books, not out of your brain.

"Mix well the freedom of your own opinion with the reverence of the opinion of your fellows.

"Continue the studying of your books, and do not spend on upon the old stock.

"Fear no man's face, yet turn not stoutness into bravery.

"Be a light to jurors to open their eyes, not a guide to lead them by the noses.

"*Affect not the opinion of pregnancy and expedition by an impatient and catching hearing of the counsellors at the bar.*²

"Let your speech be with gravity, as one of the sages of the law, and *not talkative*, nor with impertinent flying out to show learning.

"Contain the jurisdiction of your court within the ancient merestones, without removing the mark."³

Lord Coke says, after discussing the office and duties of the lord chancellor, that they are "included within his oath which followeth in these words, and consisteth of six parts. He shall sweare,

"1. That well and truly he shall serve our sovereign lord the king and his people in the office of chancelour (or lord keeper.)

"2. That he shall doe right to all manner of people, poore and rich, after the lawes and usages of the realm.

¹ Id., pp. 7-9; and see Cro. Jac. 407, and Moore's Reports, 826-830.

letters of gold and put up in every court-room in the land.

² This advice should be written in

³ Campbell's Lives Ld. Cha., vol. 8, p. 116.

"3. That he shall truly counsel the king, and his counsell he shall layne¹ and keep.

"4. That he shall not know nor suffer the hurt or disheriting of the king, or that the rights of the crowne be decreased by any meanes as far as he may let (prevent) it.

"5. And if he may not let it, he shall make it clearly and expressly to be known to the king, with his true advice and counsell.

"6. And that he shall do and purchase the king's profit in all that he reasonably may, as God him help, and by the contents of this book."²

"This oath," says Woodeson, "which is at least as ancient as the tenth year of Richard the Second, in very general terms comprehends his functions."³

§ 11. His dignity and rank.—Camden, in describing the power and dignity of the lord chancellor, says: "How great the honor and authority of *chancellor* is at this day, is so very well known, that I need not enlarge upon it: To show how great it was formerly, I will subjoin a word or two from an ancient author: 'The dignity of the chancellor of England is this: to be reputed the second person in the kingdom, and next to the king; with the king's seal (whereof he has the keeping) to seal his own injunctions; to have the ordering of the king's chapel; to have the custody of all archbishoprics, bishoprics, abbies, and baronies, vacant and fallen into the king's hands; to be present at the king's council, and to repair thither without summons; to seal all things by the hands of a clerk who carries the king's seal; and to have all matters disposed and ordered with his advice. Also, that by the grace of God, leading a just and upright life, he may (if he will himself) die archbishop or bishop: whereupon it is, that the CHANCELLORSHIP is not to be bought.'"⁴

By statute (Hen. 8, c. 10) it was ordained and enacted that the lord chancellor, being of the degree of a baron of the parliament, or above, shall sit, and be placed on the left side of the parliament chamber, on the right part of the form of the same

¹ An ancient French word signifying to hide. 4 Coke, Inst. 88.

² Id.; also 1 Woodeson's Lec., p. 168.

³ Id., p. 169.

⁴ Robert Fitz-Stephens, who lived in the time of Henry II.

⁵ Britannia (2d ed.), vol. 1, col. cclv; Choyce, Cases in Chancery, 59 60; Prax. Can. 8.

side, above all dukes (except only such as shall happen to be the king's son, the king's brother or the king's uncle, the king's nephew or sister's son.¹ Lord Chancellor Wolsey, who held the office under Henry VIII., especially prided himself upon the importance of his position and took every occasion to parade the trappings connected with it. While this "pageantry was regarded with great reverence by dependent courtiers" and "called forth many gibes from the vulgar," yet his manner of living and ostentatious display of such "trappings" may be cited as emphasizing the actual dignity of his office. It is said that his manner of living eclipsed the splendor of the king's court. His household consisted of eight hundred persons, comprehending one earl (the Earl of Derby), nine barons, and many knights and squires of great figure and worship. He had a high chamberlain, a vice-chamberlain, a treasurer, a controller, and other officers corresponding to those of royalty, bearing white staves. He had in his hall-kitchen two master cooks, with many assistants, and in his private kitchen a master cook, who went daily in damask, satin, or velvet with a chain of gold about his neck. Lord Campbell adds: "We should never finish if we were to enumerate all the yeoman, grooms, pages, and purveyors that he had in his larder, scalding-house, scullery, buttery, pantry, ewery, cellar, chauncery, wafery, wardrobe, laundry, bake-house, wood-yard, garner, garden, stable, and almoserie, with the yeoman of his barge, yeoman of his chariot, his master of the horse, saddler, farrier, and muleteer. 'Also he had two secretaries, and two clerks of his signet, *and four councillors learned in the laws of the realm.*'"² Now that he was chancellor, he was constantly attended by all the officers of the court, and by four footmen appareled in rich ermine coats,—and whensoever he took any journey, by a herald at arms, a sergeant at arms, a physician, an apothecary, four minstrels, a keeper of his tents and an armorer. Three great tables were daily laid in his hall for this numerous retinue."³ Cavendish says: "When it pleased the king's majesty, for his recreation, to repair unto the cardinal's house, such pleasures were then devised for the king's comfort

¹ Prax. Can. 6; Choyce, Cas. in Ch., n. 58.

² Cavendish, 97.

³ Lives of Ld. Chs., vol. 1, 428-29.

and consolation as might be invented or by man's wit imagined. The banquets were set forth with masks and mummeries in so gorgeous a sort and costly manner, that it was a heaven to behold. There wanted no dames or damsels meet or apt to dance with the maskers, or to garnish the place for the time with other goodly disports. There was there all kinds of music and harmony set forth, with excellent voices, both of men and children."¹

§ 12. His dignity and rank — Continued.— But it is upon his march from York House to the court of chancery in Westminster Hall that we see the lord chancellor in all his glory. He arose at day-break, heard mass, returned to his private chamber; and his public rooms being now filled with noblemen and gentlemen attending his levee,—

“He now issued out unto them appareled all in red, in the habit of a cardinal, which was of fine scarlet, or else of crimson satin, taffety damask, or caffia, the best that he could get for money; and upon his head a round pillion, with a noble of black velvet set to the same in the inner side; he also had a tip-pet of fine sables about his neck; holding in his hand a very fine orange, whereof the meat or substance within was taken out, and filled up again with the part of a sponge, wherein was vinegar and other confections against the pestilent airs, the which he most commonly smelt unto passing among the press, or else when he was pestered with many suitors. There was also borne before him — first the Great Seal of England, and then his Cardinal's hat, by a nobleman or some worthy gentleman, right solemnly, bare-headed. And as soon as he was entered into his chamber of presence, where there was attending his coming to wait upon him to Westminster Hall, as well noblemen and other worthy gentlemen as noblemen and gentlemen of his own family; thus passing forth with two great crosses of silver borne before him; with also two great pillars of silver, and his pursuivant at arms, with a great mace of silver gilt. Then his gentlemen ushers cried, and said: ‘On, my Lords and Masters, on before; make way for my Lord's Grace.’ Thus passed he down from his chamber to the Hall; and when he came to the Hall door, there was attendant for his mule,

¹ Quoted by Campbell, *loc. cit.*

trapped altogether in crimson velvet and gilt stirrups. When he was mounted, with his cross-bearers and pillar-bearers, also upon great horses trapped with fine scarlet, then marched he forward, with his train and furniture in manner as I have declared, having about him four footmen with gilt poll-axes in their hands; and thus he went until he came to Westminster Hall door.”¹

In 1527 Wolsey was sent by the king on a grand embassy to Paris. In speaking of his departure “passing through all London over London Bridge,” Cavendish gives us a minute and amusing account of the lord chancellor and retinue, “having before him of gentlemen a great number, three in rank, in black velvet livery coats, and the most part of them with great chains of gold about their necks.” He was followed by all his yeoman, with noblemen’s and gentlemen’s servants in French tawney livery coats. He says that his sumpter mules, twenty in number and more, were passed on before, conducted and guarded with a great number of bows and spears. Of the Lord Chancellor himself he says: “He rode like a cardinal, very sumptuously, on a mule trapped with crimson velvet upon velvet, and his stirrups of copper and gilt, and his spare mule following him with like apparel.” Before him were carried his two great crosses of silver, his two great pillars of silver, the great seal of England and his cardinal’s hat.²

V. THE MASTER OF THE ROLLS.

§ 13. The master of the rolls — His office and duties.— The master of the rolls was a judicial officer in the court of chancery, appointed by the crown and held the office during life. He administered justice by himself in a separate court, called the Rolls. His judicial authority was equal to that of the lord chancellor, except in cases of lunatics and bankruptcy, but all his orders and decrees had to be signed by the lord

¹ Campbell’s Lives Ld. Cha., vol. 1, 430, 431. “moving their caps” out of respect to the lord chancellor, and adds: “The

² Campbell, Ld. Cha., vol. 1, p. 444. judges did not move to the chancellor before my Lord Cardinal Wolsey’s time, who carried himself by.” Burroughs, Hist. Ch. (1726), higher than any of his predecessors.” Id. 55. He alludes to the practice of

chancellor before they were enrolled. The master of the rolls was also the chief of the twelve masters in chancery, as well as the keeper of all the records of the court of chancery, after the decree and orders had been enrolled; hence he was anciently styled *guardian des rolls*. It is unnecessary to add that he was designated *master of the rolls* because of the fact that he was the custodian of the court records, or *rolls*.¹

§ 14. His name and titles.—The master of the rolls was so called because he was the custodian of the rolls, that is, the records of the court written upon parchment and made up in bundles of rolls.² Lord Coke says: "There be in this court many officers, ministers, and clerks of the court, the principall whereof is the master of the rols, anciently called *gardein des rolles, clericus rotulorum, custos rotulorum*."³ And again he says: "Of latter times in the grant of this office he is stiled *clericus parvæ bagæ, custos rotulorum et domus conversorum*;⁴ and in no statute *master*, until the 11 Henry VII. ch. 18" (1405).⁵ And yet even then he was sometimes still called clerk, as in the 15th chapter of the same year.⁶ "His style as Master of the Rolls was 'The Right Worshipful.'"⁷ The address of a petition in chancery presented to the master of the rolls in the time of Henry VI. is as follows: "To my full honorable and right worshipfull maister my mayster the Clerke of the Rolls."⁸

Camden, enumerating the officers of the court of chancery, mentions the "keeper of the rolls belonging to the court, and thence called *magister rotulorum*."⁹ The master of the rolls was frequently styled the "King's vice-chancellor, and vice-chancellor of England, as appears by the records in the rolls chapel."¹⁰ And often *vice-cancellarius*.¹¹

During the reign of Henry VIII. he is sometimes styled *vice-*

¹ Newland's Ch. Practice (1826), p. 3; ² Brown's Praxis Cancellariæ, 10.

² "The rols of the chancery . . . are so called because they are written in parchment, and made up in bundels of rols, that is to say, of charters, letters patents, commissions, deeds enrolled, recognisances, etc." 4 Coke, Inst. 96.

³ 4 Inst. 95.

⁴ 4 Inst. 96.

⁵ Burroughs, Hist. Ch., pp. 21, 22; Reeves, Hist. Eng. Law, vol. 3, p. 154.

⁶ Prax. Can., vol. 2, p. 10.

⁷ 1 Spence, Eq. Juris. 357.

⁸ 1 Ch. Cal., lix.

⁹ Britannia (2d ed.), vol. 1, col. cclvi.

¹⁰ Jekyl, Judicial Authority of the Master of the Rolls, 20.

¹¹ Id., p. 20, note; also pp. 21, 182.

chancellor.¹ In theory the *rolls* were in the custody of the chancellor, and "that he kept them by his deputy, who was called *clerk*, or *keeper of the rolls*."² He is "called *clerk of the rolls*, 12 R. 2, c. 2, and in Fortescue, cap. 24, and by no statute else *master of the rolls*, until 11 H. 7, c. 18, and yet in c. 25, the same year, he is called *clerk*, and as a clerk he taketh oath in open court, the form whereof was by parliament, 18 E. 3, statute 4."³

The title of *custos conversorum* or *custor domus conversorum* reveals a curious bit of ecclesiastical history. The house annexed to the office of the master of the rolls was "called *domus conversorum*, so called because Hen. 3 founded this house to be a house of Jews as should be converted to the true religion of Jesus Christ. . . . King Ed. 3 *anno* 15 of his reign, by letters patents annexed this house to the office of *custos rotulorum*;"⁴ and again he adds: "This house is the place where the rolls of the chancery are kept, and are so called because they are written in parchment, and made up in bundels of rolls."⁵

"In the Register of Writs, 'the ancientest book in the law,' notice is taken of the *keeper of the rolls*; and of the masters,"⁶ while Chief Baron Comyn says: "His office is as antient as the court itself."⁷

The first person to whom the title "*master or keeper of the rolls*" is distinctly traced is John de Langton, a clerk or master in chancery, who, in a patent of 14 Edward I. (1286), was called *custos rotulorum cancellariæ domin. regis*.⁸ It has been suggested that the office of *master of the rolls* was created in the reign of Edward II., and that William de Ayremynne was the first to bear the title, but John de Langton had been called *custos rotulorum cancellariæ domini regis*; and Lord Campbell says that, "as there had been clerks in the chancery from the most remote antiquity to assist the chancellor, who were afterwards denominated 'masters in chancery,' I have but little doubt that the senior or chief of them had for ages

¹ 1 Spence, Eq. Juris, 859.

² Burroughs, Hist. Ch. (1726), p. 17. ⁶ Robinson, Hist. Ch. 465, citing Leg. Jud. in Ch., p. 187.

³ Choyce, Cas. in Ch. (1652), p. 61.

⁷ 2 Com. Dig. 208.

⁴ 4 Coke, Inst. 95.

⁸ 1 Robinson, Hist. Ct. of Ch. 409.

⁵ 4 Inst. 96.

before the particular care of the records of the court, and being so often entrusted with the custody of the seal in the chancellor's absence, had gradually been permitted to act as his deputy."¹ It is said that up to the 26th year of Henry VIII. "all the *masters of the rolls* were churchmen."²

By the statute of 21 Henry VIII., c. 13, there were twelve masters in chancery, of which the master of the rolls was one and the chief. His patent was for life; and in it he was styled *clericus parvæ bagæ, custos rotulorum, et custos domus conversorum Judæorum*; "which house is so called, because the Jews in ancient times, as they were any of them brought to Christianity, they were bestowed in that house separately from the rest of that nation in London. And this house, with its appurtenances, was designed by Edward the Third for the keeping of the rolls or records of the chancery; and therefore at this day it is called the Rolls."³ Here we find for the first time the full title *custos domus conversorum Judæorum*, "custodian of the house of converted Jews." This "House of the Jews" was founded by the king before 17 Hen. III., for the maintenance of converted Jews. It was situated in the street then called "New Street," but now known as "Chancery Lane." Over this *domus conversorum* a *custos* was appointed.⁴ In the year 1290 Edward I., by "an act done by himself in his private council," banished the Jews from England. By the banishment of the Jews the object of its foundation gradually ceased, and the house was annexed to the office of master of the rolls. It was in this reign that the office of *custos domus conversorum* was united with that of the *master of the rolls*;⁵ hence the origin of the former term as applied to this officer.

§ 15. **Antiquity of the office.**—Lord Coke says of the master of the rolls that "This is an ancient office, and grantable either for life, or at will, at the pleasure of the king."⁶ "Ever since there was a court of chancery there must have been rolls or records of that court, and consequently a keeper of them,

¹ 1 Ld. Chs. 198.

² Nelson's Ch. Reports, Preface.

³ Prax. Can., vol. 2, p. 10; Wyatt's Pr. Reg. in Ch., 277; Choyce, Cas. in Ch., p. 61.

⁴ 1 Robinson's Hist. Ct. of Ch., 370, 415; 2 Stubbs, Const. Hist. 122, 123.

⁵ 1 Robinson, *loc. cit.* 409.

⁶ 4 Inst. 95.

so that the office of keeper of the rolls must necessarily be as ancient as the court itself.”¹

In a manuscript Treatise of the Court of Chancery, ascribed to Sir Robert Cotton, it is said: “That the *custos rotulorum* hath been an Officer in the Court of Chancery of as long Continuance as the Chancellor hath been a Magistrate; and afterwards, that this Office hath long time been numbered and ranked amongst the greatest Officers and Magistrates of the Realm.”²

§ 16. His authority, duties and rank.—The exercise of judicial authority on the part of the master of the rolls can be traced from the reign of Edward I. downwards.³ During the reign of Elizabeth the master of the rolls is described as the *assistant* of the chancellor, for matters of common law; and, in the *absence* of the chancellor, to *hear causes and make orders*;⁴ but this power was always conferred on him by commission from the crown. From the time of Henry VI. we find bills for relief addressed to him.⁵ But such judicial authority as was exercised by the master of the rolls, other than that conferred by commission, seems to have “more properly belonged to him in the character of one of the masters.”⁶

The master of the rolls often sat in court with the lord chancellor or keeper; and, in his absence, heard and determined causes there; and in the evenings, and at other times, when the court at Westminster or elsewhere, before the lord chancellor or keeper, is not sitting, heard and determined causes at the Rolls.⁷

Comyn says: “It appears that the master of the rolls has a judicial authority in two distinct capacities, from the ancient constitution of his office:

“1st. As master of the rolls, sitting at the rolls, and from his decrees in that capacity, there lies an appeal to the chancellor in court.

“2d. As *locum tenens* of the chancellor *virtute officii*, with-

¹ Jekyl, Judicial Authority of the Master of the Rolls, 11.

² Quoted *Id.*, p. 11.

³ 1 Spence, Eq. Juris. 358.

⁴ 1 Spence, Eq. Juris. 358, citing Crompton on Courts (1594), fol. 41.

⁵ *Id.*

⁶ 1 Spence, Eq. Juris. 358, and note.

⁷ Wyatt's Pr. Reg. Ch. 277; 4 Coke's Insts. 96.

out any special commission, and then he sits in court for the chancellor, and his decrees are of the same force as those of the chancellor himself.

"When he sits by virtue of *special* commission, there are others joined with him, whose concurrence *may* be necessary."¹

Sir Edward Coke, ever jealous of the court of chancery, says that he cannot conceive that the master of the *rolls* hath a lawful claim to be a judge in the chancery in the absence of the lord chancellor, or lord keeper, who is the only judge of that court; or by what authority the master of the *rolls* doth sit, and determine causes in the chapel of the *rolls*, as then of late years have been used; unless he be authorized thereunto by special commission under the great seal. But much less may any other of the masters pretend any authority as judges in that high court, without like special commission. But the first precedent and institution thereof was brought in by Cardinal *Wolsey* when he was lord chancellor of England, anno 29 Hen. 8 (1538),² who first introduced the practice of the *master of the rolls* judging in causes in the lord chancellor's absence. This authority was afterward given. But before he had such commission the acts of the master of the rolls were entered as done either *per curiam* or *per cancellar*.³ The master of the rolls was an officer of the crown, admitted with great solemnity, and sworn to the faithful execution of that office, before the king himself, either in council or attended by some lords of his council.⁴ Some idea of the duties and responsibilities of the office is shown by the oath required to be taken by him, which, by act of parliament, 18 Ed. 3, was as follows: "You shall swear, That well and faithfully you shall serve our Sovereign Lord the King, and all his people, in the office of Clerk of the *Chancery*, to which you are intitled; You shall not assent nor procure to be done any Fraud to any Man's Wrong, nor any Thing that toucheth the keeping of the Seal; and you shall lawfully conceal Things that touch the King when you shall be thereunto required, and the Counsel you know touching him you shall conceal; and if you know of the King's Disherison,

¹ 2 Comyn's Dig. 209, citing Jekyl's Treatise on the Office of Master of the Rolls, 9 *et seq.*

² Prax. Can., vol. 2, p. 12.

³ Wyatt's Pr. Reg. Ch. 278.

⁴ Jekyl's Judicial Authority of the Master of the Rolls, 15.

Perpetual, Damage or Fraud to be done upon Things which touch the Seal, you shall put your lawful power to redress and amend the same; and if you cannot do the same, then you shall certify the Chancellor, or others, which may do the same to be amended to your intent.”¹

In the Practical Register in Chancery, it is said that the master of the rolls “has a long time been ranked with the great officers of the realm, as appears by the statute 12 Rich. 2, cap. 2, where it is enacted that the chancellor, treasurer, and keeper of the privy seal, the steward of the king’s house, the king’s chamberlain, the *clerk of the rolls*, the justices of both branches, the barons of the exchequer, and others that should be called to the naming of justices of the peace, sheriffs, escheators, customers, comptrollers, etc., should be sworn to do the same faithfully and without affection. He hath great power and pre-eminence by prescription, statutes and commission.”²

From the fact that he discharged the duties of a vice-chancellor he ranked high as a judicial officer. “Anciently and down to this time,” says the author of *The Judicial Authority of the Master of the Rolls*,³ “at the king’s coronation, as well as all other solemnities, the master of the rolls hath his place amongst the judges, and between the two, chief of them.”

VI. MASTERS IN CHANCERY.

§ 17. *Masters in chancery — Their antiquity and number.* In the Register of Writs, “the ancientest book in the law,” we find mention of the *Keeper* of the Rolls and of the *Masters*.⁴ Polydore Virgil says that William the Conqueror instituted a college or society of clerks in this court (then the *officina justitiæ* of the realm) for the making of all manner of writs which issued then, among whom the *clerici de prima forma* (the masters) were a principal part. These clerks *de prima forma* were, as the Lord Chancellor Eggerton says, “Grave and ancient Clerks, long experienced and skillful, in the course and prac-

¹ *Prax. Can.*, vol. 2, p. 11; Wyatt’s *Can.*, vol. 2, p. 13; Choyce *Cas. in Ch.*, Pr. Reg. in Ch., 277; Burroughs, *Hist.* p. 61.
² *Ch.*, pp. 19, 20; Choyce *Cas. in Ch.* [1652], p. 62.
³ P. 18.
⁴ *Ante*, § 15.

² Wyatt’s *Pr. Reg. Ch.* 278; *Prax.*

tice of the court.”¹ Besides the master of the rolls, the chief, there were eleven other masters of chancery; who were from time to time, upon death or surrender, appointed by the respective lord chancellor for the time being. In ancient times they were sometimes created by the king’s letters patent; but by Baggot’s Case, 9 Edward 4, 5, this practice had worn out of use, and they were then created by the election or appointment of the court, and swearing them. The oath administered to them was the same as that of the master of the rolls. It is said that the Lord Keeper Egerton ordered that there should be a memorandum of their admittance made in the close Rolls of the Petty-bag.²

Lord Coke tells us that there were “twelve masters of the chancery, whereof the master of the rolls is the chief, who by their originall institution, . . . should be expert in the common law, to see the forming and framing of originall writs according to law, which are not of course; whereupon such are called in our ancient authors *brevia magistralia*.”³ He also furnishes us with this curious note on the number *twelve*: “It seemeth to me that the law delighteth herselfe with the number 12; for there must not onely be 12 jurors for the tryall of matters of fact but 12 judges of ancient time for tryall of matters of law in the *Exchequer Chamber*. Also for matters of state there were in ancient time twelve *Counsellors of State*. He that wageth his law must have *eleven others with him*, which thinke he says true. And that *number of twelve* is much respected in *holy writ*, as 12 apostles, 12 stones, 12 tribes, etc.”⁴

Beside the master of the rolls and the eleven regular masters in chancery, the great increase of business in that court made it necessary to appoint one or more masters extraordinary, to each county, for the taking of answers, affidavits, deeds, and recognizances in the country. The course of appointment of these masters extraordinary was as follows: first, there was obtained from some gentlemen of the country a certificate to the effect that there was occasion for a master there; second, that the person who desired it was fit to be entrusted, and conformable to the government. Thereupon the lord chancellor

¹ Wyatt’s Pr. Reg. Ch. 279; Prax. Can., vol. 2, p. 15.

² Wyatt’s Pr. Reg. Ch. 278, 279.

³ 4 Coke, Inst., 81, 82.

⁴ Coke upon Littleton, 155.

granted a warrant under his hand to the clerk of the petty-bag, requiring him to prepare a commission directed to three persons empowering them, or any two of them, to administer the common oaths, as also that of the master in chancery extraordinary unto the party. Upon the receipt of this warrant, the clerk of the petty-bag made out the commission, wherein the oaths to be administered were set out *verbatim*. The commissioners so appointed made the proper return upon the back of the writ to the clerk of the petty-bag, who gave the proper certificate or a memorandum thereof. The whole charge for such an appointment amounted to 7*l.* 9*s.* 2*d.*¹

Anciently these masters extraordinary were restrained from doing anything incident to their office within five miles of London; but by an order of Lord Chancellor Clarendon they were restrained from doing anything within twenty miles of London, and they were required in every certificate to give the name of the town and county where the act was performed, otherwise the same was held not to be authentic, nor admitted to be filed or enrolled. This was done not only to show that the master was not only exercising his office where he had a right so to do, but in cases of perjury it might be certainly known where the indictment was to be laid.²

§ 18. *Their name and title.*—A curious little work, written somewhere between 1596 and 1603, entitled “A Treatise of the Maisters of the Chauncerie,” the author of which is unknown, furnishes us with much interesting information relative to the origin and early history of the office of master in chancery. The author, whoever he was, was himself one of the “maisters.” In the preface it is said, “the peculiar obsolescence of the spelling might induce a conjecture that the manuscript was of a much earlier date.” The author of this work says: “For the better unfoldinge of this whole matter wee will hold this cours: *First* to treat of the manner of ther creation; *secondly* of the sundrie appellations or names and of ther number; *Thordlie* of ther dignitie and place in respect of ther office; *Fowrthlie* of ther duetie and service in chauncerie, and what manner of learninge is requisite in them; *Fifthlie* of ther ffees, allowances and rewarde.”

¹ Wyatt's Pr. Reg. Ch. 282.

² Wyatt's Pr. Reg. Ch. 282-283.

Of their names, he says, these officers of the court were known by various names, such as *Magistri cancellariæ*; *Concilium regis in cancellaria*; *Socii* and *collaterales*; *Clerici de prima forma*; *Clerici prima gradus*; *Clerici de majore gradu*; *Magni clerici*, and *Nostri clerici ad robas*. Of their number, he says "it appeareth planenlie from all antiquitie it hath bene twelve," of which the master of the "rolles beinge alwaies the first." He adds that "they were called *clerici*, because they were auntientlie all of them cleorgie men."¹

The writs which the masters in chancery "made were called *Brevia Magistralia*, because these Clerks who made them for their Science were well called *Magistri Cancellariæ*. . . . The clerks were grave and ancient, skillful and well experienced in the course of Chancery, and called *Clerici de prima forma*, and of late times *Magistri Cancellarii*."² "The ancient name of *Clerici de prima forma*," says the author of Choyce Cases in Chancery, writing in 1652, "is almost forgotten," and he adds regretfully, that now "few of them have had that learning in the laws of England which was required of those men;" yet, he admits upon the next page, that these clerks, now known by the later name of *Masters in Chancery*, "are in these days also grave and wise men."³

The masters were called *clerici de prima forma* in opposition to the clerks called *clerici de secunda forma*, or those who wrote *brevia formata*, or *brevia de cursa*, or writs of course. It is said that the former were not as of ancient date as the latter; that in course of time "new cases sprung up that required new remedies, to which the writs in the register were thought not applicable; the formation of new writs became necessary, in the opinion of the ancient lawyers, and these sett of clerks *de prima forma* were established for that purpose, perhaps about the time of the Statute 31 Edward I., c. 23 (1302).⁴ As early as the time of Edward III., 1330, we find this ancient name, *Magistri Cancellariæ*, translated into the old Norman-French, "*Mestres de la Chauncellerie*."⁵

Although the clerks (masters in chancery) were called *clerici*

¹ Treatise of the Maisters of the Chauncerie, Hargrave's Tracts, 294, 297.

² Choyce Cas. in Ch., pp. 66, 67.

³ Id., pp. 67, 69.

⁴ Burroughs, Hist. Ch. (1726), pp. 24, 25.

⁵ 2 Rot. Parl. 41.

de prima forma, yet the office of cursitors was accounted much more ancient; for to the latter it only belonged to make out all original writs which were the foundation of the proceedings at the common law.¹

In the Practical Register in Chancery, it is said: "The later name of masters in chancery is retained at this day, in regard of the wisdom and skill which they are supposed to have."²

§ 19. *Their creation.*—Of the manner of their creation, the author of the Treatise of the Maisters of the Chauncerie, already quoted, says: "Concerninge the manner of ther creation I finde it to have bene at severall times in sundrie sorts; for in auntient times I finde it sometimes granted from the kinge, but in Ed. the 4th his time, this seemeth to have growen out of use and remembrance. They were then 'admitted and sworne' by the 'chaunceller,' and a record made thereof, but he adds 'although peradventure in owld time it were not heald necessarie, when the maisters heald ther places in the hostel of the chauncerie, and were sufficientlie known by those liveries which they wore of the King's guift and of the chaunceller's delivery.'" At the time the masters were admitted and sworn the ceremony was completed by putting on a cap of which our author says: "Nowe in the verie form of the creation, namelie in the putting on of a cap, there is a representation of antiquitie and mastership, not unlike the usage amongst the Romaines, when men were made citizens of Rome."

The record of the installation of a master by Lord Chancellor Hatton, May 16, 1587, preserves the fact of putting on the cap as a part of the ceremony. The record runs thus: "This present day Richard Swale, Doctor of the Civil Law, was placed as a Master in Chancery in ordinary in the room of Mr. Doctor Barkeley deceased, by the Right Honorable Sir Christopher Hatton, Knight, Lord Chancellor of England; and his lordship did put on the said Mr. Swale's cap," etc.³ Lord Campbell says: "A hat being substituted for the cap, the ceremony remained down to Lord Brougham's time."⁴ He adds, in speaking of Lord Eldon's appointment of a Master in

¹ Prax. Can., vol. 2, p. 25.

³ Reg. Lib., B. p. 492, quoted &

² Wyatt's Pr. Reg. Ch. 279; 2 Prax. Can. 18.

Camp. Ld. Chs., p. 302, note.

⁴ Id.

Chancery, temp. George III.: At this time the Lord Chancellor appointed Masters of his own sole authority, by putting a black velvet cap on the head of the new Master in open court.¹ By statute 3 & 4 W. 4, c. 94, the power of appointment was nominally transferred to the crown, upon the recommendation of the Lord Chancellor,² and he naively adds: "Happily the office is now abolished."

In the early history of the court of chancery the masters went into the offices as clerks in their youth, and it was only after years of patient training that they were promoted to the position of masters. In a bill presented by one John Baron, the oldest master then in office, to the chancellor, in time of Queen Mary (1553-1558), for reformation of abuses in the office, it is stated: "Till now of late Days, the Greatest number of the Masters in *Chancery* were, from their Youth, brought up in said Court, which had not only perfect Knowledge in the Course of the said Court, but also were expert in all Kinds of Writs," which writs were also in "true Course and fair written," . . . "By Means whereof the Youth, then being in the Court, did not only practice to write fair, but also studied, and applied their whole Mind to have Knowledge and Cunning, without which they were at that time fully persuaded not to come to any Promotion in the said Court, nor yet to be any Gainer."³ After patiently serving this apprenticeship and acquiring this necessary degree of "Knowledge and cunning" they were habled⁴ by the whole Court to be a Cursitor,⁵ and make Writs and Process in his own Name; and so being habled by the most ancient Master of the *Chancery* then present, he was presented to the Master of the Rolls, for the time being; and then the Master of the Rolls admitted him, and gave him his oath, which was then great Encouraging to the Youth in the said Court, to apply themselves to get Knowledge and Cunning.⁶

These young clerks, or apprentices, were called *juvnes et pedites*, young persons of inferior condition, who, for the dis-

¹ Id., vol. 9, p. 446.

² Id.

³ Burroughs, Hist. Ch. (1726), p. 36
et seq.

⁴ An obsolete form of the word

able, here used in the sense of "authorized" or "empowered."

⁵ For *cursitor* see *post*, §§ 22, 30.

⁶ Burroughs, *loc. cit.*

patch of business, were, by the favor of the chancellor, permitted to be employed in making out the *brevia cursoria*, or writs of course. They were under the superior clerks, who were answerable for their acts, and for this reason it was required that the writer's name should be noted on every writ.¹

"In former times those were admitted into the number of the masters, that had bene brought up and instructed in the court from ther youth, and that by the advisement and consent of the king's counsaile in chauncery."²

The masters, upon their entrance to their office, took the following oath:

"Ye shall swear, that well and truly ye shall serve the King, our Sovereign Lord, and his People, in the office of one of the Masters of his Chancery, to which ye be called. Ye shall not assent ne procure the disheritance, ne perpetual Damage of the King to your Power, ne Fraud ye shall not do, nor cause to be made wrongfully to any of his People, ne in any thing that toucheth the Seal. And lawfully, ye shall council in the Things that toucheth the King, when ye shall be thereunto required; and the council ye shall give touching him, ye shall not disclose; and that he know any thing of the Disheritance, or Damage of the King, or Fraud to be made upon any thing that toucheth the keeping of the Seale, ye shall put your lawful Power it to redress, amend, and if that ye cannot do, ye shall advise the Chancellor or Lord-Keeper of the Seal, or other which may that amend to your Power; *As God you help.*"³

§ 20. Their office and duties.—It was the business of the masters to hear and examine the petitions and complaints of suitors, and give them a remedy by the king's writ, fitted to their case. They were called by Fleta *collaterales and socii* of the chancellor.⁴ They were thus called because in the performance of this duty, in theory at least, they were associated with the chancellor. The party complaining used to be referred to the chancellor (in person, perhaps, originally), and related to him the nature of his injury, and prayed some method of redress. Upon this the chancellor framed a writ applicable to the case, in such form, as to give the specific redress wanted.

¹2 Reeves, Hist. Eng. Law, 251.

³Burroughs, Hist. Chan. (1726), pp.

²Treatise of the Maisters of the 27, 28.

Chauncerie, Hargrave's Tracts, 294.

⁴2 Reeves, Hist. Eng. Law, 251.

When this had been long practiced such a variety of forms had been devised that there seldom arose a case in which it was necessary to exercise much judgment; the old forms were followed, and became precedents of established authority in the chancellor's office. Thus the making of writs grew to be a matter of course; and, the business increasing it was at length confided to the *masters* and afterward to clerks called *clerici cancellariæ*, and later *cursitores cancellariæ*.¹ Yet if any difficulty arose in the framing of a writ the chancellor and masters consulted together, hence the term *collaterales and socii* applied to them. Burroughs tells us that: If the lord chancellor and the *magistri cancellariæ* agreed in the form of a writ, the form stood for law, and there was no reference to parliament; but if they did not agree then they were to resort thither.² Again he says that by special appointment of parliament these twelve clerks, or masters, were made coadjutors with the chancellor in forming the *brevia magistralia*, for unless they all agreed they were to go to parliament, but in all other cases they were assistants only, or as they were properly stiled, the council of the chancellor.³ They were "constituent parts of the rules of this court, as the Chancellor's *Council* or *Assistants*."⁴

It was also the duty of the masters to attend the lord chancellor and master of the rolls at the sitting of the court, in rotation, taking their seats upon the bench, and remaining there until they were permitted to retire, which was usually soon after the sitting, that they might attend to the business of their respective offices.

In the Practical Register in Chancery, it is said that "their office seems originally to have been partly to sit as assistants with the Chancellor; and still two or three of them, by turns, sit with him at Westminster in term time, and two at a time when he sits out of term; and two of them sit with his honor the Master of the Rolls."⁵

Two masters also attended the House of Peers every day during its session, and were employed in carrying their messages to the House of Commons, except such as related to the

¹ Id., vol. 1, 60.

² Hist. Ch. (1726), p. 28.

³ Id., p. 82.

⁴ Id., p. 58.

⁵ Wyatt's Pr. Reg. Ch. 279; Prax. Can., vol. 2, p. 18.

royal family, which were usually carried by the judges; such masters as were members of the House of Commons, however, were excused from this duty. On the trial of a peer, or of any person impeached by the Commons, all the masters attended every day. The masters also attended at coronations and processions of state. The holidays kept at the master's office consisted of four vacations, viz: from the last seal after each term to the first seal before the following term; and, besides these vacations, particular holidays were kept in the private office, as follows: King Charles' Martyrdom, Candlemas Day, Lady Day, Ascension Day, the Restoration of King Charles II., Midsummer Day, and the Gunpowder Plot.¹

§ 21. **Their office and duties — Framing original writs.**— Some of the duties of these ancient masters seem odd enough to us; for example, some of the masters determined the proper writ necessary to redress the particular wrong complained of and directed the inferior clerks to make them, while others examined these writs carefully, before sealing with the great seal. When doubts arose not only the justices took counsel of these masters, but even the king himself called his chancellor, treasurer, justices and masters together to consult relative to causes. "Some of the maisters, named commaunders, should consider of the proper writt or commission fitt to trie and redresse every particular greife or wronge which is complayned of, and direct the cursiters and other inferior clerks to make them; and others, againe, tearmed examiners, when they are soe made, should examine them, *in ratione, dictione, et fillabis, et literâ* before they be put unto to the seale. And heretofore, when doubts did arise upon writts sent out of the chauncery, or to be formed and composed there, not onlie the king's justices were wont to send to conferr with the masters concerninge the same; but the kinge himselfe hath sometimes, togeather with his chaunceller, and justices, called alsoe his *clericos ad robas*, to consult about such causes."² But the skill of these masters in composition was employed in other matters besides the preparation of writs, viz., to patents and in writing letters for the

¹ Newland, Ch. Practice, vol. 1, 8-10.

² Treatise of the Maisters, Hargrave's Law Tracts, 301.

king, and this because of their great learning, their skill in composing and their knowledge of Latin — the then court language of Europe.¹

§ 22. Their office and duties — Framing original writs — Continued. — Another part of their duties was to assist the chancellor “alwaies at sealinge times; and in the absence or sickness of the chancellor they had the overlookinge and direction of the same themselves, as may be evidently and plentifully proved out of the records of the court.”²

To understand the nature and importance of these duties it is necessary for one to look into the ancient office of the chancery,— the “workshop in which all original writs, by which alone actions could be prosecuted, were forged.”³ Under the law as it then stood, no action could be commenced in any common-law court unless by permission of the chancellor, who, having first determined the proper remedy, issued an appropriate writ under the great seal of the king.⁴

After this system of proceeding by writs was established (all of which, as above stated, were issued under the great seal of the king), for the purpose of preserving due regularity in the form and in the mode of issuing such writs, and for the ease of the chancellor, who, besides having the care of the great seal, had other important duties to perform, there were associated with the chancellor a certain number of clerks (*clerici*) called *præceptores* (afterwards *masters*), whose duties, as regards the issuing of writs, were, to *hear and examine* the complaints of those who sought redress in the king’s court, and to furnish them with the appropriate writs. These

¹ “Ther care both in composinge and examininge stretched somewhat farther than to writts; namlie to pattents and lettres to bee written for the kinge, and to examininge of records and exemplifications; and therefore in this behalfe there was also too points of learninge requisite in them more then are mentioned in Fleta; the one skill in the chauncerie course of writinge; the other, good skill in the Lattine. . . . And by reason that they were well skilled in the Lattin toungue, and

used to composinge of epistles, it semeth also the king used ther paine and skill in writinge lettres to forraine princes, without charging himselfe with newe stipends to Latine secretaries as nowe is used.” Id. 802, 803.

² Id. 807.

³ Spence, Eq. Juris., vol. 1, 238.

⁴ It was in this sense that Lambard described the office of the chancery, in homely phrase, as “the forge and shop of all originalls.” Quoted in Parkes, Hist. Ch., p. 27.

early masters were universally ecclesiastics and *doctors of the civil law*, who had, also, an intimate knowledge of the laws of England. We have here these masters in chancery — doctors of the *civil law* — determining whether there was a remedy at *common law*, and if so what was the proper remedy.¹

Besides the masters, or superior clerks, there were six other clerks belonging to the chancery, whose duty it was to engross writs not strictly of course; and junior clerks to write out from the register of the chancery in which the forms of writs were enrolled, those writs which were of course, *de cursa*. In the time of Henry III. (1216–1272), there were, it seems, fifty-one of these writs *de cursa*, but their number was afterward greatly increased. In the reign of Edward III. (1327–1377), the clerks who issued these writs *de cursa* had acquired the name *cursitors*, which they retained until the last reign (1830–1837), when they were abolished. The whole establishment of the chancery (which was also an office of the parliament) followed the king.²

§ 23. Their office and duties — Framing original writs — Continued.— For all this the king derived a revenue. Some writs were high priced, as we find creditors promising the king a quarter or a third of the debts which they hoped to recover by their means. Some distinction was made between necessities and luxuries; a writ claiming a freehold was a necessary, but a writ to aid a creditor in the collection of a debt was a luxury, for in the local courts he could proceed without writ. That the poor could have their writs for nothing was an accepted maxim.³ In the year 1347 an effort was made by the Commons to reduce the fees upon writs out of chancery, which were represented to be contrary to the words of Magna Charta, “*Nulli vendemus justitiam;*” but these constituted a branch of the royal revenue, which the haughty Edward II. would not suffer to be touched and returned for answer, “Unto the poor it shall be given *for God’s sake*, and it is reasonable that those who can afford to pay should pay, as they have been accus-

¹ Id. 238 and note.

² Id.

³ Pollock & Maitland, Hist. Eng.

Law, vol. 1, p. 174, citing Fleta, p. 77; Excerpte • Rotulus Finium, ii, 101.

omed." A second effort was made in 1382 to accomplish the same result, when the king again answered, "That such fines had always been received in Chancery as well since as before the Great Charter, by all his noble progenitors, Kings of England."¹

§ 24. **Their office and duties — Attendance upon parliament.**— As the chancery was "an office of the parliament," it was the duty of these ancient masters to attend upon the "higher house of parliament." The judges to observe the minds and reasons of the lawmakers, that they might the better interpret the laws made by them, and the masters that they might, likewise, the better frame the writs under the same; the judges that they might inform the lords as to former laws of the realm, touching the matter in hand; the masters, men chosen for their skill and learning in the canon or civil law, that they might inform the lords as to laws touching foreign matters, how they shall accord with equity and the law of other nations. The author of "Maisters of the Chauncerie" tells us, in quaint old English, that: Another part of ther service is in attendinge in the higher howse of parliament, whither they come withowt writt as beinge a part of the same court. For both the parliament is summoned by writts owt of the chauncerie; the acts made are enrolled and kept in chauncerie; all commandments of that court are expedited, either by writs out of chauncery, or by the chauncelor's serjant at armes; the lord chauncellor is ever speaker of the howse withowt further choice or appointment as is used about the speaker of the lower howse, and ought withowt any writt to attend there, (although the contrayrie have bene of late used by some of the pettie bag not well instructed of the auntient manner; for what neede hath the Kinge to sende notice under his seale of the attendance to those whoe have the keeping of the sayed seale?), and the clark of the parliament hath his fee owt of the hanaper as an officer of the chauncerie. The reason of ther attendance there I take to bee, not onely for the receving of petitions; but as the judges are there, that, by observinge the minds and reasons of the lords that make

¹ Campbell, *Lives of Ld. Cha.*, vol. 1, pp. 286, 269.

the lawes, they maie the more agreeable to ther meaninge expound and interpreate the sayed lawes; soe the masters of the chauncery are there also, that they may likewise frame the writts that are to bee made upon those lawes in like correspondencie; and as the judges furthermore maye informe the lords, howe former lawes of this realme presentlie stand touchinge any matter there debated; soe may they bee alsoe informed by the masters of the chauncery (of which the greatest number have alwaies bene chosen men skillfull in the civill and canon lawes) in lawes that they shall make touchinge foraine matters, whowe the same shall accord with equitie, *jus gentium*, and the lawes of other nations.¹

§ 25. Their office and duties — References.— Sir Robert Cotton, the famous lawyer and antiquary, in a manuscript treatise on the court of chancery, written, probably, somewhere between 1603 and 1625, speaking of references to masters in chancery, says:

Forasmuch as the Masters in Chancery at this day are grave and wise men, though many of them of another profession, and are not employed in framing of writs as at the first, yet they do sit on the bench with the Chancellor; and he taking advantage of their opportunities and leisure (many times of late) refers matters which have depended in that court, and are ready for hearing, unto their examinations, which, upon their certificate, are decreed accordingly. But it is a true saying that *new meats and old laws are best for use*. And I know not how, but the people do much complain of the new employment of them.²

In 1377 we find the Commons, among other things, petitioning the king "that the Common Laws and other statutes and ordinances of the law may be observed, and may *not be defaced with master-ships* or singularities."³

References to masters were made by the chancellor as early as the reign of Richard II. In the twenty-first year of his reign (1397), an examination was taken by two masters *præceptis cancellarii*, touching the validity of a bond.⁴

¹ Maisters of the Chauncerie, Hargrave's Law Tracts, 308, 309.

² 2 Camp. Ld. Chs. 366, note.

³ 1 Robinson, Hist. Ch. 639.

⁴ 1 Spence, Eq. Juris. 364 and note, citing Leg. Jud., p. 76.

Mr. Ravenscroft insists that the first reference to a master in chancery was during the chancellorship of Sir Christopher Hatton, and in consequence of that chancellor's ignorance.¹

We are told that as the business of the court increased and new forms of writs more seldom required, the practice of forming writs decreased, the lord chancellors began to refer matters of account and such like to the masters for examinations, and decrees were entered according to their certificate or report. Exceptions taken to answers and irregularities in practice, contempt and such like were also referred to them.² But, whatever the fact may be as to when causes first began to be referred to masters for decision, the statement of Sir Robert Cotton shows that the practice became more frequent about this time, that is during the chancellorship of Lord Ellesmere. But hardly had the practice began, although it proved of great service in working out details, until this complaint of the people was heard. Lord Campbell says: "The Clerks or Masters in Chancery being freed from all trouble in superintending the issuing of writs, had abundant leisure, were of great service in working out the details of decretal orders. But the complaint already began, that the Equity Judge, to save himself trouble, and to acquire a character for dispatch which he did not merit, instead of patiently examining the facts and the equity of the case, as he might and ought to have done himself, hastily referred everything to a Master, who was sometimes found listless or incompetent; and if (as it might happen) he possessed more knowledge as well as industry than his superior, still the suitor was vexed with undue delay and expense."³

Reeves tells us that it was during the reign of Edward VI. (1547-1553) that masters were entirely abstracted from the business of the seal, and the making of writs; and though now and then consulted in matters of judicature, they had much leisure. Therefore the chancellor began sometime in this reign to refer to them an examination into matters depending in court, which, at length, became their ordinary employment.⁴

¹ Parkes' Hist. Chan., p. 70.

² Wyatt's Pr. Reg. Ch. 280.

³ Ld. Chs., vol. 2, 366.

⁴ Reeves, Hist. Eng. Law, vol. 5, 161.

§ 26. Their office and duties—Generally.—Newland specifies their general duties as follows: It was their duty to execute the orders of the court of chancery, upon references made to them by the court, acting either in the exercise of its original jurisdiction, or under the authority of any act of parliament, or by the lord chancellor or vice-chancellor, in lunacies or bankruptcies; and by reports in writing, to certify in what manner they had executed such orders. It would be impossible, he continues, to specify every head of reference, because they are almost as numerous as the matters subject to the jurisdiction of the court; but the following is a statement of such as most frequently occur:

To examine into any alleged impertinence or scandal in any bill or answer, and the sufficiency of any answer or examination;

To examine into the regularity of proceedings had in court;

To settle interrogatories for the examination of parties;

To take the accounts of executors, administrators, trustees and guardians, and between parties of every description;

To inquire into and decide upon the claims of creditors, legatees, and next of kin;

To appoint receivers of personal estates, and of the rents of real estates, fix their salaries, and examine their accounts;

To inquire as to repairs to be done, and into the propriety of felling timber, and granting leases;

To sell estates, and to approve of the investment of trust money in the purchase of estates, and for this purpose, to inquire into their value, to investigate the title to them, and settle the conveyances;

To inquire for the heirs and next of kin of persons dying intestate;

To appoint guardians of the persons and estates of infants, and to allow proper sums for their maintenance and education;

To appoint committees of the persons and estates of lunatics, and to examine the accounts of such committees;

To tax the costs of proceedings in any suit, or under the orders of the court, and also the bills of costs of solicitors, delivered to their clients, and referred for taxation under the statute of 2 Geo. II., c. 23, and also the bills of costs for

business done in bankruptcy, pursuant to statute 5 Geo. II., c. 30;

To inquire whether infants are trustees or mortgagees within the statute 7 Anne, c. 19;

To inquire under the statute 39 Geo. III., c. 56, into the interest of parties in money subject to be laid out in lands;

In general, he adds, there is no question of law or equity, or disputed fact, which a master may not have occasion to decide or respecting which he may not be called upon to report his opinion to the court;

In addition to these duties the ancient masters had the custody of such title deeds and original instruments as the court saw fit to place in their care, for the security and benefit of the parties interested.¹

§ 27. Their skill and learning.—Of their skill and learning the author of the Treatise of the Maisters of the Chauncerie, in his quaint old English, tells us that to discharge these various important duties a “knowledge of the common lawe, and that as Fleta sayeth *plenier*, is requisite in the master, for awardinge *brevia remedialia*, and sundrie other causes: that the knowledge alsoe of the civill lawe, which nowe in a manner is insteade of *jus gentium*, and of the canon lawe, which undoubtedlie was composed by men of great learninge and understandinge, was also necessarie in them to direct the course of most things debated in the court, and to open the reason of divers things to bee judged there, and to assist the lord chauncelor in all these kindes of causes; whoe is as it were the fountaine of all kindes of lawes exercised in England, and from whome all other courts derive the streames of ther jurisdictions, or maye rather bee resembled to the ocean, from which all streames doe not onelie *defluere* but alsoe do refluere into the same againe. And not in thes onelie, but in all things that the lord chauncellor determineth accordinge to equitie, in all orders that hee taketh for the government and direction of the court and the ministers thereof, it were most convenient, that hee used th’ advice and learninge of the king’s *clarks ad robas*, being appointed to ass sist him as his counsaile.”²

¹Newland, Chancery Practice, vol. 1, 5-6.

²Treatise of the Maisters, Hargrave’s Law Tracts, 313.

From the same source we learn that these "antient masters" were required to be honest, circumspect with "skill in the chauncerie writing," also "good skill in the Lattine." To these qualifications were added a knowledge of the common law, and "auntientlie men skillfull in the civill and canon laws" were chosen to supply some of the places, because "they could not discharge this ther office, except they were indewed with soe great knowledge, skill and learninge, that they might informe and assist the lord chauncellor in dispatchinge and judginge maratime, martiall, and ecclesiasticall causes dependinge in chauncerie."

As we have already seen, the writs which they made were called *brevia magistralia*, because the clerks which made them were for their knowledge called *magistri cancellaria*, masters of the chancery, as those who did write the *brevia de cursu*, writs of course, were called *cursistarii*, cursisters or cursiters, and these masters in chancery according to Lord Chancellor Egerton, were "grave and ancient clerks, skilfull and long experienced in the Course and Practice of the Court, formerly called *Clerici de prima Forma*, and since *Magistri Cancellariæ*."¹

"The latter names of *Masters of the Chancery*, they retain at this Day, in Regard of their Gravity and Wisdom."²

It was especially in the framing of these writs that their "skill in the chauncerie writing" and "good skill in the Latine" was put to the test, because "exceptions were taken to these writs in the courts to which they were directed, for not agreeing with the register, and for divers other informalities, because such informal writs raised a presumption that they did not issue out of the great shop of justice, from which all courts ought to found their authority in civil pleas."³

Cases were sometimes overthrown by the "nescience and unskilfulness" of those who framed the original writ, and the poor client, disheartened by seeing his case, when it was near ended, "again put upon the anvil, as though it were still rough work, and new to begin again."⁴ For this reason they were bound to "have knowledge and skill in the true form of

¹ 2 Browne's Praxis Cancellaria, 14, 15.

³ Gilbert, Forum Romanum, 19.

⁴ Choyce Cas. Ch. (1652), p. 76.

² 2 Prax. Can. 18; Wyatt's Pr. Reg. Ch. 279.

writs," for the "want of skill and cunning" in drafting them was not a misprision that was amendable.¹

So particular were the courts in regard to these original writs that the use of "false Latin" was ground for abatement.²

§ 28. **Their dignity and rank.**—These old *Maisters in Chauncerie* were ever jealous of their prerogatives, and watchful against any curtailment of their privileges. One of their number, however, committed a serious indiscretion in the "howse of parliament," which gave a back-set to their dignitie. "Doctor Barkley, a master of the chauncery, in the 18th of the quene, sittinge in parliament howse, as the manner is, upon occasion of speeche amongst the lords of certaine officers to have certaine privileges, withowt askinge leave got up, and entred into a speech of desiringe, that the masters of the chauncery might alsoe bee comprised in the sayed privilege then one foote; which request came soe unseasonably, and was so inconsideratelie propounded by the said doctor, as the lords in generall tooke offence thereat; and amongst the rest some of great authoritie sayed, that whilst the quene's learned counsell were silent, it were great presumption in him, beinge one inferior to them, to bee soe busie. Soe as upon this the next day, the serjant, atturnie, and sollicitur, tooke place above the masters of the chauncery there, which before time had never bene donne; and ever sithence, not onelie they, but serjants at lawe alsoe, doe it generallie at all publique meetings upon this reason, that they tooke place before the attornie and sollicitor."³

"Antiently," our author informs us, "the clarks and officers of the chancery kept together, either in the king's howse, or in some spetial hostell appointed for them where they had lodgings and dyet allowed them." They also had allowance for "horsemeate" that is provision for horses, and allowance for "botehire,"⁴ and that in the best manner." They were allowed

¹Id., pp. 75, 76.

²"The original writ ought to be true Latine, for if it be *hab, hos breve pro hoc breve*, 9 H. 7, 16, or *Uxorij* in a *præcipe quod reddat*, by a woman where it ought to be *Uxori*, etc., the Writ shall abate." Choyce Cas. Ch. (1652), p. 91.

³Treatise of the Maisters of the Chauncerie, Hargrave's Law Tracts, p. 298.

⁴In 41 Edward III., 1327, there is a Writ to the *Clerk of the Hanaper*, to pay to the *Clerks de prima forma* (Masters in Chancery), several sums of money to buy a *Barge* and for a

their fuel from the king's park, or, as expressed in the quaint old spelling: "There was also fewill allowed owt of the king's parks for this hostell of the chauncerie." Their diet was not of the meanest, as may well appear from a complaint exhibited against them in parliament, in 1382, charging "that they were over fatt, both in bodie and purse, and overwell furred in their benefices, and put the kinge to veiry great cost more then needed." Of wine they had "12 tonnes by the yere, for every moneth a tonne." Their robes were furnished by the king, and delivered by the lord chancellor,—delivered in specie, the one *furred* for winter, and the other lined with *tafta* for summer. No wonder that the author of this queer little book sighed for the good old times when his "predicessors had lodginge, meate, drink, fier, appairell, attendance, horsemeat, botehire, a tonne of wine for every moneth in the yere," "besides benefices or pensions, and many ordinarie fees."¹

Browne, in his *Praxis Cancellaria*, 1725, says: The later names of *Masters of the Chancery*, they retain at this day, in regard of their Gravity and Wisdom. They retain likewise their ancient precedence before all other Clerks, and do set upon the Bench with the Lord Chancellors, or Lord Keepers, as well as when they were Cojudices with them in matters concerning form, and then they were allowed Robes out of the King's Wardrobe.²

The author of *Choyce Cases in Chancery*, writing in 1656, speaking of the masters in chancery, says: They retain their ancient precedency before all other Clerks, and do sit upon the Bench with the Chancellours, as when they were Cojudices with him in matters concerning form;³ and again we are told that the Masters were from the first component parts of the King's Council, and as such they attended the highest house of Parliament, and were frequently appointed as receivers of petitions.⁴

man to take care of it, also to keep it in repair. Burroughs, *Hist. Chan.* 1726, p. 31, note.

¹ This curiosity in legal literature is found in Hargrave's *Law Tracts*, pp. 291-312.

² Vol. 2, p. 18.

³ P. 69.

⁴ 1 Spence, *Equitable Jurisdiction*, 359; Hargrave's *Law Tracts*, 308.

VII. OTHER OFFICERS OF THE COURT.

§ 29. **Other officers of the court.**— Besides the lord chancellor, the master of the rolls, the eleven other masters in chancery, and masters extraordinary, there were numerous other officers of the court, but as to most of these, want of space prevents anything but a bare mention of their titles with a few suggestions as to their duties. Next to the masters were the Six Clerks, who were under the directions of the master of the rolls by whom they were appointed.¹

The Six Clerks, next in degree to the masters in chancery, were of ancient continuance; unto whom belonged the drawing of all Patents, Commissions, Licenses, Pardons and Warrants, that passed the Great Seal of England; for which reason they were called *Clerici Scribentes in Rotulis*, as appears by certain constitutions made for ordering the court of chancery, 12 Ric. 2, since which time the reputation of their office "hath so much increased, that they have been specially assigned amongst other officers to attend at the Time of the King's Coronation, as appears by the Records of the Herald's office. Their office was kept in Chancery-Lane, wherein all proceedings by English Bill and Answer are transacted and filed: also out of this office issued Pardons of Men for Chance-Medley, Commissions of Bankrupts and others."²

They held their offices of the master of the rolls, and had many clerks under them, who did the business of the office and accounted to them for the same.³ These six *clerici prænotariorum* were next to the masters in authority, and with them were considered *familiares* of the king, and were provided with board and clothing out of the profits of the seal, for their trouble in writing out writs.⁴

Under these Six Clerks there were a number of other clerks, which were either increased or decreased by order of the court. In Wyatt's Practical Register in Chancery it is said: "They were lately ninety, but are now reduced to sixty. These clerks not only write the process and copy of proceed-

¹ Wyatt's Pr. Reg. Ch. 108.

² Prax. Can., vol. 2, 20, 21.

³ Prax. Can., vol. 2, 21; Wyatt's Pr. Reg. Ch. 108.

⁴ 2 Reeves, Hist. Eng. Law, 251.

ings, but do now manage causes, attend to court, etc." The lord chancellors found it necessary to make strict rules for the government of these under clerks, which will be found in the Practical Register in Chancery.¹

• It will be a consolation to modern college professors, whose lives are made burdensome by the pranks of freshmen and sophomores, to know that human nature has been the same in all ages and at all times, and that the lord chancellors, in the olden time in England, were put to their wits' ends to suppress the exuberant spirit of the boys. Witness the following order entered 1688:

"WHEREAS divers complaints have of late been made to the Honorable the Master of the Rolls, of the outrageous, rude, and indecent demeanors of divers of the young clerks, servants and writers to and for the sworn clerks in the six clerks office, to the great scandal of this Court, and hinderance of business, which hath been most notorious, by their throwing dirt, filth, ink, and many other things, to the damage and prejudice of the suitors of this Court, and Masters in the said office, and at other times by a rude and violent clapping their desks and making many loud outcries and noises, and by evil treating their masters in the said office, with opprobrious language, etc."²

The threat of the Bridewell for the first offense, and expelling for the second, seem to not have had the desired effect, but rather the reverse, for in December, 1693, we find the court again gravely entering another order, with a view to suppress such offenses, the preamble of which read as follows:

"WHEREAS complaint hath been made by the petition of the sworn clerks of this Court, to the Right Honorable the Master of the Rolls, that divers of their under-clerks have of late behaved themselves after a bold, insolent, rude, and disorderly manner in the six-clerks' office, as well towards their respective masters, as to others the sworn clerks, and to the suitors of the Court attending the dispatch of their business there, by unmannerly and abusive language, breaking of windows, cutting desks, breaking down seats, throwing stones,

¹ Pages 107, 108.

² Beames' Orders in Ch., p. 276.

and other things at the said sworn clerks, and their clients, whereby, and by making rude and indecent noises, often forced them to leave the said office, and caused the same to be shut up in the most usual time of business, and when the Court hath been sitting, to the great scandal thereof, etc.”¹

§ 30. **Other officers of the court — Continued.**— The Clerk of the Hamper, or Hanaper, was also an officer of the court of chancery. He was otherwise styled Warden of the Hamper. His office was to receive all moneys due to the king for the seals of charters, patents, commissions and writs; also fees due the officers for enrolling and examining the same. He was obliged to attend the lord chancellor or lord keeper every day in term-time, and at all other times when the seal was open; having with him leathern bags wherein were put all writs etc. after they were sealed with the great seal; which bags were then sealed up by the lord chancellor, or lord keeper, with his private seal, and then delivered by this officer to the Comptroller of the Hamper, to be disposed of by him, as to his office appertained.² It was his duty “to attend the lord keeper every day in term-time; and at all other times when the seal is open, having with him leathern bags,” called probably hampers formerly, wherein were put all writs, &c, after they had been sealed with the great seal: which after so being sealed up by the lord keeper with his private seal were by the clerk of the hamper delivered to the comptroller of the hamper, to be disposed of by him as belonged to his office.³

“He is tied to the Lord Chancellour or Lord Keeper in his dayly attendance in term time, and at all times of sealing, he having with him leather bags, wherein are to be put all charters, &c, after they be sealed, and those bags being sealed up by the Lord Chancellours privy Seal, are to be delivered to the Controullor of the Hamper, who upon receipt of them, doth as to the office appertaineth.”⁴

There were also other clerks called *Cursitors*, so called because of the writs which they framed.

¹ Id., pp. 295, 296.

² Wyatt's Pr. Reg. Ch. 109, 110.

³ Prax. Can., vol. 2, 22; Choyce Cas. Ch. (1652), p. 73.

⁴ Choyce Cas. Ch. (1652), p. 74.

"Although the clerks before mentioned, called *Clerici de prima Forma*, have the precedenoy, yet the office of *Cursitors* is accounted much more ancient; for them only it belongs to make out all Original writs, which are the Foundation of Proceedings at the Common Law."¹ These *cursitors* were bound by the duty of their office to have knowledge and skill in the forms of original writs; for their mistakes were not amendable simply as misprisions under statute of 8 Hen. 6, c. 12.² The *cursitors* were twenty-four in number and constituted a corporation of themselves; they had allotted unto them severally certain counties, into which they made out and sent writs original and others as were required of them by the attorneys of the courts at law.³

"There were clerks of the Petitbag, of which the Master of the Rolls was the chief. Their office was to record all returns of all inquisitions out of every Shire; all liveries and Ousterlemains granted in the Court of Wards, to make all patents of customes Gaugers, Comptrollers, and Almaggers, all *Conge de fliers* of Bishops." Besides the above they performed many other duties unnecessary to be mentioned here.⁴

The clerk of the petty-bag was an officer of the court of chancery, and in his office there were three clerks, of whom the master of the rolls was chief. Their business was to make all patents of customers, gaugers, comptrollers and alnegers; and all *Congés d'eslire*, for bishops.⁵

§ 31. Other officers of the court — Continued.— The Register was an officer of the court appointed by the crown, and had under him four deputies, who attended the court in their turns, two at a time. It was the register's duty to note down, draw up, enter, and keep the decrees, orders, publications and injunctions of the court. The registers were sworn for the due execution of their office.⁶

The Comptrouler was also an officer of the court of chancery, attending on the lord chancellor daily in term time and days appointed for sealing: "His office is to take all things sealed

¹ Preface 3d Part Coke's Reports; Choyce Cas. Ch. (1652), p. 75.

² Prax. Can., vol. 2, 25; Finch's Law, 53 b.

³ Prax. Can., vol. 2, 26.

⁴ Choyce Cas. Ch. (1652), p. 78.

⁵ Prax. Can., vol. 2, 22.

⁶ Wyatt's Pr. Reg. Ch. 367.

from the Clerk of the Hamper, in bags of leather," and to "open the bags to note the just number, and especially the nature and effect of all things so received, and to enter the same in a special book with all the duties appertaining to his Majesty, and other officers for the same, and so chargeth the Clerk of the Hamper with the same."¹

There were two Examiners in the Court of Chancery, whose duty it was to examine parties in any suit upon oath, also witnesses produced on either side; reduce their answers and depositions made to interrogatories to writing, but the witnesses or parties were first required to be sworn by a master in chancery.²

There was also a Sergeant at Arms, otherwise called Sergeant at Mace, because of the great mace carried by him as a badge of his authority.³

The office of the sergeant at arms was to attend the lord chancellor, or lord keeper, in this court; "he carried the Mace before wheresoever he goeth, and calls all Persons before his Lord at his Commandment, there being but two ways to cause defendants to make their appearance, or come into this court, viz: either by this officer or by subpoena."⁴

There were also many other officers; there were other minor clerks of the court, whose duty it was to take charge of particular matters, such as "Clerk of the Faculty," "Clerk of the Presentments," "Clerk of Appeals," and "Clerk of the Patents."⁵

VIII. EQUITABLE JURISDICTION OF THE COURT OF CHANCERY.

§ 32. Equity jurisdiction — Its origin and definition.— Equity jurisdiction may properly be defined as follows: "It consisted of that portion of the king's judicial prerogative in civil cases which he had retained in his own hands, having never delegated it to his judges by writ."⁶ It must not be understood that, after the complete establishment of the court of chancery, the king took "cognizance of equity cases personally, any

¹ Choyce Cas. Ch. (1652), p. 74;
Prax. Can., vol. 2, 24, 25.

² Prax. Can., vol. 2, 26.

³ Choyce Cas. Ch. (1652), p. 77.

⁴ Prax. Can., vol. 2, 26.

⁵ Prax. Can., vol. 2, 27, 29, 30, 31.

⁶ Langdell, Eq. Pl., xx.

more than he did of common-law cases, but in legal contemplation he did; and the chancellor differed from the common-law judges in this particular among others, namely, that he exercised the king's prerogative directly, his judicial acts deriving their efficacy from the fact that, in legal effect, they were the acts of the king, the chancellor being little more than the king's secretary."¹

Hallam says that "the equitable jurisdiction, as it is so called, of the court of chancery, appears to have been derived from that extensive judicial power which, in early times, the king's ordinary council had exercised. The chancellor, as one of the highest officers of the state, took a great share in the king's business; and when it was not sitting, he had a court of his own, with jurisdiction in many important matters, out of which process to compel the appearance of parties might at any time emanate. It is not unlikely, therefore, that redress, in many matters beyond the legal province of the chancellor, was occasionally given through the paramount authority of this court. We find the council and the chancery named together in many remonstrances of the Commons against interference with private rights, from the time of Richard II. to that of Henry VI."²

Woodeson, in accounting for the gradual concentration of equitable jurisdiction in the chancellor, says: "The same persons, who had counselled the king how to exercise his old constitutional power of mitigating, in particular instances, the rigor of positive law, exercised it themselves in his absence, the chancellor being the chief; and the authority of the rest gradually centered in him. For he had been antiently, the principal, if not sometimes the sole, adviser."³

Campbell defines the equitable jurisdiction of the chancellor as follows: "By 'equitable jurisdiction' must be understood the extraordinary interference of the chancellor, without common-law process, or regard to the common-law rules of proceeding, upon the petition of a party grieved, who was without adequate remedy in a court of common law; whereupon the opposite party was compelled to appear and to be examined, either personally or upon written interrogatories;

¹ Id. ² 1 Hallam, Const. Hist. of Eng. 469. ³ Vol. 1, pp. 176, 177.

and evidence being heard upon both sides, without the interposition of a jury, an order was made *secundum æquum et bonum*, which was enforced by imprisonment.”¹

As we have already seen, the king’s subjects, failing to find a remedy for their grievances in the ordinary courts, brought their matters directly before the king, or the king and his council, by petition. “The King referred these Petitions sometimes to the Chancellor alone; sometimes to the Chancellor and Council; when perhaps, by the encrease of business, it was thought proper to turn them over to one particular officer, the Chancellor, who was usually a Bishop, or spiritual person, and more able than any other to judge of equity and good conscience, in the opinion of the old world. Thus the Chancellor became a standing judge, to hear and decide petitions, and, in the end, people intituled their suits to him, and not to the King.”²

“The origin of the equitable jurisdiction of the chancellor is connected directly with the King’s Council. The Chancellor had long been, as a baron of the Exchequer, and as a leading member of the *Curia*, in possession of judicial functions. To him, as well as to the justices of the land and the Exchequer, the ordinance of 1280 referred a distinct class of petitions. But as yet the King was the chief judge in equity, or ‘matters of grace and favor.’ And ‘matters which were so great, or of grace, that the Chancellor and others could not dispatch them without the King,’ were ordered to be brought before the King, and, except by the hands of the Chancellor and other chief ministers, no petition was to come before the King and his council. At this period, then, the Chancellor, although employed in equity, had ministerial functions only. When early in the reign of Edward III. the Chancellor ceased to be a part of the King’s personal retinue and to follow the court, his tribunal acquired a more distinct and substantive character, as those of the other courts had done under like circumstances; petitions for grace and favor began to be addressed primarily to him, instead of simply referred to him by the King.”³

¹ Ld. Chs., vol. 1, p. 8.

² Barrourghs, Hist. Ch. (1726), 18.

³ Stubbs, Const. History of England, vol. 2, pp. 268–69.

§ 33. Equity jurisdiction — Its origin and definition — Continued.— As applications to the king and his council became frequent it was found necessary to make provisions to facilitate their disposal. For this purpose a committee of the council was appointed along with the chancellor to determine points in question. As these counselors had seldom any special knowledge of the matters referred to them, they naturally paid but little attention to the business, and as their number was arbitrary it was gradually diminished, until at last their appointment, being regarded as a mere ceremony, was entirely discontinued, and the business left in the hands of the chancellor and his subordinate officers who assisted him in the discharge of his duties; and from this time forward petitions addressed to the king were at once referred by him to his deputy — the chancellor.¹

As might be anticipated, as the kingdom increased in population and wealth, the king found it inconvenient or impossible to personally attend to the increasing number of applications to him for the exercise of this "prerogative of grace." For this reason, even as early as the reign of Edward I., we see the king turning matters over to the chancellor for disposition. Spence says: "It was the custom with this monarch to send certain of the petitions addressed to him praying extraordinary remedies, to the chancellor and master of the rolls, or the chancellor or the master of the rolls alone, by writ under the privy seal (which was the usual mode by which the king delegated the exercise of his prerogative to the council), directing them to give such remedy as should appear to be consonant to honesty (*honestati*)."² The convenience of this method of disposing of such petitions, and its efficiency being demonstrated in practice, together with its superiority over the king's council,³ greatly increased references of this character, so that by the time of Edward III. (1326–77), the court of chancery appeared as a distinct court for giving relief in cases requiring extraordinary remedies. Speaking of this king, Spence says

¹ Millar, English Government, vol. 2, p. 345.

² 1 Eq. Juris. of the Court of Ch., p. 335.

³ "Considering what was the con-

stitution of the council, great inconvenience and uncertainty must have resulted from leaving the correction and extension of the law in civil cases to such a tribunal." Id.

that he "being, as may well be conceived, looking to the history of his busy reign, unable from his other avocations to attend to the numerous petitions which were presented to him, he, in the twenty-second year of his reign (1348), by a writ or ordinance referred all such matters as were *of grace*, to be dispatched by the chancellor or by the keeper of the privy seal."¹

It was this reserved judicial power of the king which was turned over to and exercised by his deputy — the chancellor. "The same duty of the crown to do justice where its courts fell short of giving due redress for wrong expressed itself in the jurisdiction of the chancellor. This great officer of state, who had perhaps originally acted only as president of the council when discharging its judicial functions, acquired at a very early date an independent judicial position of the same nature. It is by remembering this origin of the court of chancery that we understand the nature of the powers it gradually acquired. All grievances of the subject, especially those which sprang from the misconduct of government officials or of powerful oppressors, fell within its cognizance as they fell within that of the Royal Council. . . . Its equitable jurisdiction sprang from the defective nature and the technical and unbending rules of the common law. As the council had given redress in cases where law became injustice, so the court of chancery interfered, without regard to the rules of procedure adopted by the common-law courts, on the petition of a party for whose grievance the common law provided no adequate remedy."²

In speaking of the early court of chancery Nelson says: "The chief business of the court of chancery at that time was to mitigate the rigour of the common law, and *clergymen* were thought sufficiently qualified for that purpose, who gave relief according to their several opinions, in cases where the law seemed to bear too hard on the complainant, and, because they formed their judgment by no settled or established rules, therefore we have no reports of their decrees."³

§ 34. Antiquity of the court of chancery.— The very name of the court itself and the official designation of its presiding

¹ Id., p. 337.

³ Nelson, Ch. Reps., Preface.

² 1 Green's Hist. of the English People, p. 328.

officer come down to us covered with the dust and bearing the musty odor of more than twenty centuries; and speak of a time when church and state were united, when the Roman faith held undisputed sway over our British ancestors, and when the highest offices in the gift of the king were filled by ecclesiastics.

Of the court of chancery it was said by Lord Hobart that it is a "fundamental court as ancient as the kingdom itself."¹

Coke says, after quoting a passage from the *Mirror*: "Hereby it appeareth that in the reign of King Alfred there was a court of chancery out of which writs remediall issued, which was not then instituted, but affirmed to be a court then *in esse*."²

While it is said that the origin of the equitable jurisdiction of the chancellor is untraceable,³ yet a careful examination of historical sources will enable us to see, if not its commencement, at least the manner of its origin and the lines of its progress.⁴

"The history of the court of chancery is inseparably connected with that of the other courts of law, and the origin of its equitable jurisdiction is only to be traced by exploring the great course of justice to which equity is but a tributary stream, not the main channel."⁵

As early as Bracton's time men were beginning to speak of the chancery as a court, but even in the reign of Edward I. (1272-1307) it was not in any modern sense a court of justice; it did not hear and determine causes, but it was rather a great secretarial bureau, a home office, a foreign office and a ministry of justice. At its head was the chancellor, who, there being no longer a chief justiciary of the realm, ranked highest among the king's servants. He was the king's secretary of state for all departments. Under him were numerous clerks, the high-

¹ Martin v. Marshall, Hob. R. 63; 2 Comyn's Dig. 205; 2 Coke, Inst. 23, 551, 552; 4 id. 78, 79; Bracton, 108; Mirror, 8; Story, Eq. Jr. § 40.

² 4 Inst. 78.

³ The commencement of the chancellor's equitable authority is untraceable, and has prescription for its parent. Burroughs, Hist. Ch. (1726), p. 44.

⁴ "All the Judges of England, 10 Edw. 4, 53, did manifestly affirm that the Chancery, King's Bench, Common Pleas, and Exchequer be all the King's Courts, and have been time out of mind, and so that no man knoweth which of them is most ancient." Choyce Cas. in Ch. (1652), p. 57.

⁵ Parkes, Hist. Chan., p. 8.

est in rank among whom might fairly be styled 'under-secretaries of state,' ecclesiastics holding deaneries or canonries; they were sworn of the king's council; some were *doctores utriusque juris*; they were graduates, they were "masters;" some of them as notaries of the apostolic see were men whose "authenticity" would be admitted all the world over.¹

§ 35. Antiquity of the court of chancery — Continued.— Constant directions from the king to his chief executive officer became necessary. As the chancery followed the king wherever he went, these communications were evidently at first oral and delivered direct by the king in person, but as the business increased in volume, and although theoretically the chancery still "followed the king," yet, as a matter of fact, it now often happened that the king was in one place while his chancellor was in another, it now became necessary that confidential clerks or secretaries should intervene, whose duty it was to carry written or oral messages.² "In its final form almost every message, order or mandate that came, or was supposed to come, from the king, whether it concerned the greatest matter or the smallest, whether addressed to an emperor or to an escheator, whether addressed to all the lieges or to one man, was a document settled in the chancery and sealed with the great seal. Miles of parchment, close rolls and patent rolls, fine rolls and charter rolls, Roman rolls, Gascon rolls and so forth, are covered with copies of these documents, and yet reveal but a part of the chancery work."³

Of this work, the most important was done by the king himself, by the king and his deputy — the chancellor — by the chancellor alone, while matters of less moment were committed to the master of the rolls and masters in chancery. Scores of clerks and under clerks were employed in the mechanical work of writing, copying, transcribing, engrossing and filing away of these rolls. Certain days were set apart for "sealing," that is attaching the great seal to such orders, writs, documents and other matters ready for it. The mere mechanical work of "sealing" must have been great, as during a few months not only

¹ History of English Law, Pollock & Maitland, vol. 1, p. 172. liamentary Roll of 83 Edward I, p. XXXVII.

² Id., p. 178; also Maitland's Par- ³ Pollock & Maitland, History of Eng. Law, vol. 1, pp. 173, 174.

hundreds of pounds but tons of wax were used for this purpose,¹ and all this was done or supposed to have been done under the eye of the chancellor.

“The ancient Lawyers that speak of the Chancery, mention it not once as a Court of Equity or Conscience, but always as a Court of ordinary Power, to determine Causes according to the Rules of the Common Law. The Equitable Court, perhaps, had not fully joined the other in their Time; and when they did meet, and became Brother-Courts, they did not move on *pari passu*, like *Hippocrate's* Twins. The younger soon over-run, and overpower'd the Elder, stiled itself, *officina Justitiæ & Equitatis*, seized every thing into its Jurisdiction; and, at last, made itself a *Ware-house*, into which all our Properties was going to be cast.”²

§ 36. The king as the source of all legislative and judicial power.—The whole system of English remedial jurisprudence was based on the theory that the king was the fountain or source of all justice and to him the subject must apply for every real or imaginary wrong. In the most primitive times this application was doubtless addressed direct to the ear of the ruler and he in person granted the relief desired or refused the application, as to him seemed to be just or right. As time progressed these applications would naturally become more numerous and the questions raised more complicated, thus rendering this duty so onerous and burdensome as to render it impracticable for the ruler to discharge such duty, and thus arose the necessity and practice of delegating this authority to deputies. These deputies probably at first only listened to petitions and recommended to the king the granting or refusal of the same, the latter duty still being discharged by the ruler. Probably in matters of small importance, and in cases where nothing was to be done but to follow precedent, these deputies took the liberty, or were permitted, in person, to grant or refuse the relief prayed. But these deputies were always kept near the king so that at any time he could be consulted or preside over their deliberations. In course of time other courts were established by the king, as business increased or necessity required, and these might hold their sessions in dif-

¹See *post*, § 60.

²Burroughs, *Hist. Ch.* (1726), 2.

ferent parts of the kingdom for the greater convenience of suitors; but, to secure uniformity in practice, and to keep apparent the fact that "all power of judicature whatever flowed from the king," these courts were not permitted to act until a petition was first presented to the king or his deputy, and a writ issued under the great seal returnable in the particular court, which writ constituted the sole authority of the court to proceed in the case; in other words, it was a license to the subject to prosecute his suit and a grant of authority to the court to hear it.

We have no historical record of the "king's court" when it consisted of the king alone; indeed the origin of the various English courts, as they existed say in the seventeenth century, is shrouded in obscurity, yet on every hand we find preserved the proofs showing that the general outline given above is correct; but it is only in theory that we can go back to that primitive period when the king's court and the king were one and the same.

As has already been shown, in the remotest period of English history the kings had their chancellor or advisers constantly in attendance and ever ready to aid, advise and assist the king in the discharge of his official duties. Afterward we find the chancellor and other officers appointed by the king constituting the king's court or *aula regis*. Lord Chief Baron Gilbert says: "The king's own court consisted of the justicier, who was the chief officer of state, and the chancellor, or keeper of the seal, and such other barons and tenants *in capite*, as the king called to their assistance; these were called by writ to the determination of particular causes, and tho' towards the latter end of the *Norman* period, there were some great officers of state that were constantly resident, yet the king, according to the weight of the cause, called sometimes more and sometimes less in number; and by virtue of such writs they sat and transacted all civil business."¹

It was the king who created parliaments and courts — the former to help him to enact laws for the benefit of his subjects, and the latter to aid him in the administration of the law; and, in both cases, it will be noted that it was only a

¹ Chancery Practice (1758), p. 2.

portion of the power, all of which originally belonged to the king, that was so delegated. Royal edicts and ordinances, promulgated from time to time, as well the rights, reserved right of confirmation by giving the royal assent, and the refusal of such assent by veto, attest the fact that all the law-making power was not delegated, while the continual administration of justice in response to direct petition, originally by the king in person, or by his agents, show the reservation of a portion of the judicial power, all of which originally existed in him.

Keeping the principle above stated constantly in view, viz., that the king, by divine right, was the source or fountain of all justice, we can readily understand the practice in the various courts, their respective jurisdictions, their relation to each other, and many other things which, without reference to this keystone of the arch, would be unaccountable.

§ 37. **The king sitting in person as trial judge.**—Not only was the king the source of all judicial power, and, as such, created courts for the administration of justice, but history furnishes us with innumerable examples of the king sitting in person in court as the trial judge deciding causes brought before him on petition by his subjects feeling themselves aggrieved and unable to obtain remedy in the ordinary method in the courts.

Bracton tells us that the king may and ought to judge, and that this duty belongs to the king himself and none else, if he alone can suffice to do it, since he is bound to do this by virtue of his oath. He then adds: "For this purpose he has been created and elected, that he should do justice to all persons, that in him the Lord should sit, and that he should, of himself, decide his own judgments, for if there was no one to do justice, peace would be easily exterminated; and it would be superfluous to make laws to distribute justice, unless there was one to maintain them."¹

Speaking of the administration of justice in person by the king, Sir William Dugdale says: "The king, and no other, ought to be judge, if he alone were able to perform that task, being thereunto obliged by the tenor of his oath; to him therefore it

¹Bracton, 11, cix, fol. 107.

belongs to exercise the power of the law, as God's vice-regent and officer on earth. But if the king cannot of himself determine every controversy, to the end his labor may be the less by dividing the trouble amongst divers persons, he ought to choose men of wisdom, fearing God, and out of them to constitute judges."¹ The same author, in commenting upon the impossibility of this personal administration of justice by the king to long continue among any people, further says: "When by the multiplying of people inequity so increased as that contentions and differences did daily more and more abound, it was impossible that any one person should hear and determine all their causes, or any one place be of capacity sufficient to receive all the suitors."²

Maddox, speaking of the administration of justice by the kings in person in early times, says: "Let no man suppose it to be a novel usage for kings to sit personally in judicature. On the contrary it is a very ancient one, and conformable to the law and practice of nations in many ages; of this it may suffice to produce here a few instances. Solomon, King of Israel, a wise and magnificent prince, adjudged personally in the cause of the two women, one of whom had a living child and the other a dead one."³

The *Anglo-Saxon* kings, with the assistance, or latterly perhaps through the medium of their councils, exercised *contentious jurisdiction*. Edgar and Canute appear to have made regular progresses through their dominions to superintend the internal government and to hold courts for the administration of justice.⁴

Of Richard the First it is said that "Assiduous in administering justice to his people he sat every Monday and Thursday in his judicial tribunal; he received all parties, patiently continued till night in answering them, and suffered none to appeal to him unheard."⁵

Edward the First frequently sate in the King's Bench on im-

¹ *Origines Juridiciales* (3d ed.), p. 19, 88 *et seq.*, quoted in Marsh's *Hist. of the Courts of Equity*, p. 5.
² Quoted by Marsh, *loc. cit.*
³ 1 Maddox, *Hist. of the Exchequer*,
⁴ Spence, *Eq. Juris. of Court of Ch.*, vol. 1. p. 75.
⁵ Turner, *Hist. of Eng.*, vol. 1, p. 814, citing Bohadin, 10-12.

portant occasions, and the ordinary stile of that court still supposes the presence of the sovereign. The same prince, by the advice of his chancellor and others of his council, determined such causes as required equitable relief.¹

§ 38. The king sitting in person as trial judge — Continued.— Lord Coke says: "It appears in our books, that the King may sit in the Star-chamber; but it was to consult with the justices, upon certain questions proposed to them, and not *in judicio*: So in the King's Bench he may sit, but the court gives the judgment: and it is commonly said in our books, that the King is always present in court in the judgment of law; and upon this he cannot be nonsuit: but the judgments are always given *per curiam*."²

It is said that Henry V. as King Henry his father had done, used for custom every day, when no state was kept, after dinner to have a cushion laid on a cross-board, and there to lean for the space of an hour or more to receive bills and hear complaints of whomsoever would come.³

In theory we may suppose the existence of a time when the king personally disposed of all petitions to him involving matters of "grace or favor," yet doubtless very early in the history of such appeals, owing to the amount of labor involved in their examinations, and the many other duties devolving upon him, it became a matter of necessity to turn over the greater number of such petitions to deputies. The latter having more time, and being, as we may well suppose, selected, by reason of their skill and learning, especially for the discharge of such duties, could perform the same with greater satisfaction to suitors.

In the earliest periods of his office he probably exercised the judicial functions in person. What is fiction now, was in those days reality. Justice was then really administered by the king; it was one great branch of his employment. Henry I. at leisure times sate every day in his own house till twelve o'clock to hear and determine causes, *secum habens comites barones et vavasores*, whence he obtained the name of *Leo Justiciæ*.⁴ But it is evident that this primitive condition must

¹ 1 Woodeson's Lectures, p. 174.

² 7 Coke's Rep. (Pt. XII), p. 64.

³ Seton, Early Records in Equity, quoted 80 Law Mag. 103.

⁴ Parke, Hist. Ch., p. 10.

give way as the country increased in population, wealth, and civilization. Applications to the king in person for redress soon necessarily became so frequent that it was impossible to dispose of them in that way. "When the monarch was no longer able to transact this business in person, or perhaps had more important and seductive affairs to engage his attention, he appointed *deputies* or assistants with various titles: they performed the labor, represented him in the courts of justice, exercised his power, and used his name.¹

In speaking of the *Curia Regis* of Henry II., Stubbs says: "The king himself took a leading part in the business, much of which was done in his presence. . . . Yet side by side with this there appears a show of judicial activity among the subordinate members of the household, the court and the exchequer. The chancellor as we learn from the lives of S. Thomas, was constantly employed in judicial work, whether in attendance upon the king, or as the Pipe Rolls² also testify, in provincial visitations. As early as the second year of the reign of Henry of Essex the constable, Thomas the chancellor, and the Earl of Leicester the cojusticiar, are found hearing pleas in different counties. The chancellor, if we may believe the consistent evidence of his biographers, habitually relieved the king of the irksome part of his judicial duties."³

Spence says that it appears that in early times, probably down to the reign of Edward III., that it was to the *select* or *privy council*, presided over by the king himself, or some person delegated by the king when absent, that all applications for the special exercise of the prerogative in regard to judicial cognizance, criminal and civil, were discussed and decided upon.⁴

§ 39. The king interfering with the courts.—It took centuries of time to eradicate from the minds of English kings the idea that the courts were their mere tools or agencies and, as such, could be tampered with whenever inclination or interest prompted it. Indeed, it took the sturdy manhood and independence of such judges as Lord Coke to dispel the illusion

¹ Id., pp. 10, 18.

Stubbs, Const. Hist. of England, vol. 1, p. 879.

² The Pipe Roll was a parchment record or document "called from its shape the great Roll of the Pipe."

³ Stubbs, Const. Hist. of England, vol. 1, pp. 598, 599.

⁴ Eq. Juris, vol. 1, 829.

and teach their majesties that, in all matters coming within the jurisdiction of the courts and in which they could provide a remedy, any interference on the part of the king would not be tolerated. Upon this subject history furnishes us with ample evidence.

In the reign of Edward the Fourth, some riots having occurred at Bristol, the king, by letter signed by him and sealed with the signet, ordered the chancellor to make a commission for the trial of the offenders, the king, in his own hand, saying: "Cosyn, yff ye thynke ye schall have a Warrant, ye may have one made in dew forme; We pray you hyt fayle not."¹ Toward the end of his reign he gave an order, by letter to his lord chancellor, even still more peremptory in character, directing an inquisition to be made out for the benefit of his "Lady Mother," concluding as follows: "This we wol you speed in any wise, as our trust is in you;" adding in his own hand, "My Lord Chancellor, thys most be don."²

The practice of the king interfering with the action of the court in behalf of some favorite, sometimes took the form of simply asking for delay. The following sample of such a letter missive from James I., directed to Lord Chancellor Ellesmere, serves the double purpose of showing the form of such communications and, also, the quaint English of the period:

"To our right trustie and welbeloved Counsellor Thomas Lord Ellesmere, our Chancellor of England.

"James R.

Right trusty and welbeloved counsellor, wee greet you well. Wee have heretofore recommended to you the case of Robert Wulverstone, depending before you in Chancery, because he had in the Parliament house shewed himself forward in our service, and our desire was, that either so much favour might be shewed him as with equitie might stand, or that nothing were done against him till the next terme; since wee have been informed from him that his adversary presseth him now out of terme, whereupon wee have thought good to require you, that because he hath other business to attend in the vacation, he may not be urged to anything till the terme, and that then

¹ Campbell, Lord Chancellors, vol. 1, p. 24.

² Id.

a day certain be given for the hearing of his cause, which wee must leave to the equitie of the Court, not doubting but that you will regard one of whose service we are pleased to take notice, so farre forth as in justice you may.

Given under our signet, at Leicester, the eighteenth day of August, in the twelfth yeare of our raigne of England, France, and Ireland, and of Scotland the eight-and-fortieth."¹

§ 40. The king interfering with the courts — Continued.— Lord Campbell observes that there is no reason to suppose that the chancellor was influenced by these communications beyond granting delay, but it does seem to a lawyer of this age that if he had been solicitor for the complainant in the case referred to, with knowledge that such a letter had been written to the chancellor by the king, he would have had some doubt about his client's receiving a fair and impartial hearing. It was not so much *what* the king asked for as the fact that he saw fit to ask any favor at all in behalf of one of the parties. Certainly the "adversary" referred to must have felt a little uneasiness as to the result if he knew that the king was soliciting favors from the judge for one who "had in the Parliament house shewed himself forward in our service." It will be noted too that this was the second time the king had appealed to his chancellor in behalf of his favorite, as he says, in the opening sentence, that "we have heretofore recommended to you the case of" the defendant.

It was enacted by parliament:² "That neither the King, nor his Privy-Council, have, or ought to have any jurisdiction, power, or authority, by *English* bill, petition, articles, libel, or any other arbitrary way whatsoever, to examine or draw into question, determine, or dispose of the lands, tenements, hereditaments, goods, or chattles, of any of the subjects of this Realm; but the same ought to be tryed and determined in the ordinary Courts of Justice, and by the ordinary Course of Law, which is only a confirmation of Magna Charta."³

Even so late as 1608 James the First undertook to stand upon the right of the king to interfere in the administration of justice, contending "that the judges are but the delegates

¹ 2 Lives of Ld. Chs. 406, note.

² 16 Car. 3, c. 20 (1640).

³ Quoted in Burroughs' Hist. Ch., p. 15.

of the king, and that the king may take such causes he shall please to determine, from the determination of the judges, and may determine them himself," being told by the Archbishop of Canterbury "that this was clear in Divinity, that such authority belongs to the king by the word of God in the scripture." But the judges, Lord Coke being one of them, informed the king, that no king after the conquest assumed to himself to give any judgment in any cause whatsoever, which concerned the administration of justice within this realm, but these were solely determined in the courts of justice.¹ Lord Coke mentions another case in which the king heard a controversy between parties concerning land, and gave sentence therein, which sentence was "repealed for this, that it did belong to the common law." To this the king replied that he "thought the law was founded upon reason, and that he and others had reason, as well as the judges." To this Lord Coke told him roundly: "That true it was, that God had endowed his majesty with excellent science, and great endowments of nature; but his majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it; and that the law was the golden Met-wand and measure to try the causes of the subjects; and which protected his majesty in safety and peace." "With which," adds Lord Coke, "the king was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said, that Bracton saith, *Quod Rex non debet esse sub homine, sed sub Deo & Lege.*"²

§ 41. Rigid rules of law defeating justice.—In the beginning of the administration of justice the judges were of course without precedent, and each case as it arose was "one of first impression." The decisions upon cases as presented were based on the immediate feelings of the judges, that is, upon considerations of equity. In the course of their labors they would

¹ 12 Coke, 63-65.

abeth, see 1 Spence, Equity, 414 and

² Id. For similar acts of interference with the courts, by Queen Eliz-

note.

necessarily encounter many similar cases. In the disposition of these a proper regard for consistency, a sense of justice, as well as the avoidance of the appearance of partiality, led them to follow the decision in the first case, and thus a rule was established applicable to all similar cases; in other words, the doctrine of precedent was established, and soon a law, though made by the court, asserted itself so that even the power that created it did not feel at liberty to disregard it, and thus the doctrine of *stare decisis* was recognized. From an examination of a number of cases certain leading circumstances were found common to them all, and, reasoning by analogy, the principles applicable to these were applied to other cases, although the leading facts in the latter may only partially have resembled those found in the first class, and thus the various decisions of the courts were classified and gradually reduced into order. In many of the cases belonging to the latter class the court found itself under the necessity of recognizing exceptions to rules previously established and supposed, at the time they were originally laid down, to have been of universal application.¹

While the utility of general rules thus established could not help but be recognized, yet the courts, in course of time, found themselves crippled in the administration of justice by the very rules laid down by themselves. These "primitive rules of law, introduced by unexperienced and ignorant judges, were even far from attaining that perfection which was practicable. They were frequently too narrow; and frequently too broad. They gave rise to decisions, which, in many instances, fell extremely short of the mark; and which, in many others, went far beyond it."²

§ 42. Rigid rules of law defeating justice — Continued. For the purpose of administering the law the king established courts of justice, but these courts had no power to make laws, but only to apply them to individual cases as they came before them. By applying the same rule to similar states of facts the authority of precedent soon asserted its force, and thus the court soon found "itself rigidly bound by set form and custom." Green, in his History of the English People,

¹ 2 Millar's English Government, 354, 355.

² Id.

says: "These bonds in fact became tighter every day, for their decisions were now beginning to be reported,¹ and the cases decided by one bench of judges became authorities for their successors. It is plain that such a state of things has the utmost value in many ways, whether in creating in men's minds that impersonal notion of a sovereign law which exercises its imaginative force on human action, or in furnishing by the accumulation and sacredness of precedents a barrier against the invasion of arbitrary power. But it threw a terrible obstacle in the way of the actual redress of the wrong. The increasing complexity of human action, as civilization advanced, outstripped the efforts of the law. Sometimes ancient custom furnished no redress for a wrong which sprang from modern circumstances. Sometimes the very pedantry and inflexibility of the law itself became in individual cases the highest injustice."²

There was but one remedy open to the people for this evil, and that was by appeal to the original source of judicial power for redress. "It was the consciousness of this that made men cling from the very first moment of the independent existence of these courts to the judicial power which still remained inherent in the crown itself. If his courts fell short in any matter, the duty of the king to do justice to all still remained, and it was this obligation which was recognized in the provision of Henry the Second by which all cases in which his judges failed to do justice were reserved for the special cognizance of the royal council itself. To this final jurisdiction of the king in council, Edward gave a wide development. His assembly of the ministers, the higher permanent officials, and the law officers of the crown for the first time reserved to itself in its judicial capacity the correction of all breaches of the law which the lower courts had failed to repress, whether from *weakness*, *partiality*, or *corruption*, and specially of those *lawless outbreaks* of the more powerful baronage which defied the common authority of the judges."³ This power of the council, though regarded with jealousy by the parliament, appears to have been steadily put into force through the two successive centuries.

¹ He is writing of the period of Edward I, 1272-1307.

² Vol. 1, pp. 326, 327.

³ *Loc. cit.*

Chancery has a common-law side as well as an equity side, and the former is much more ancient than the latter; and, as a common-law court, it had a staff of clerks known as the Six Clerks, who had an office together, and had charge of all its records.¹

The three functions of the early court of chancery are accurately stated by Mr. Pike to be:

1st. The functions of the chancery as *Officina Brevium*, or fountain-head of justice, sending forth its remedies for wrongs in the form of original writs returnable in other courts.

2d. The judicial functions of the chancery in proceedings commenced otherwise than by bill.

3d. The judicial functions of the chancery in proceedings commenced by bill.²

It is of its equitable jurisdiction only that we propose now to speak. The common people soon understood that the chancellor, when in the exercise of this equitable jurisdiction, could mitigate the rigor of the common law and thus do justice in each particular case, according to the very right of the matter; hence they soon began to speak of his court as a court of *equity* or a *court of conscience*. We are told that: "Forsomuch as this court bridleth the rigour of the common law, by giving actions and exceptions for remedies where by law none were, according to equitie and conscience, to maintaine *æquum et bonum*, the common people terme the chancery the court of conscience."³

§ 43. **Petitions to king and council for remedy.**—As the king was the source or fountain of all justice, and the courts were only agencies of the king acting through his deputies, the judges, the most natural thing in the world for the subject, when these courts, hampered by technical rules, or when puzzled by new cases not provided for by precedent, were unable to do complete justice, or afford the relief which the exigencies of the case demanded, was to humbly petition the king for assistance in the premises. Mr. Spence, in his great work on Equitable Jurisdiction of the Court of Chancery, says: "We may observe that human sagacity, as we are taught by all experience, as regards legislators much more enlightened

¹ Langdell, Eq. Pl. XXX.

² 1 Law Quarterly Rev. 443.

³ West's Symboleography (1618), Pt. 2, fol. 176, sec. 12.

than those of the Anglo-Saxons, must fail in any attempt adequately to provide by anticipation for every possible state of circumstances. Accordingly, as we have seen, it was soon found necessary, where the positive law required to be tempered or supplied, that the king, as the supreme governor, should be resorted to, to provide by his authority, personally, or under the advice of his council, a suitable remedy for the particular case, and in *some cases* to provide by enactment for future cases of a similar nature."¹

From records still preserved it seems that as early as the reign of Henry V. (1413-22), regular forms were observed by parties seeking redress by direct appeal to the king, and from the prayer of said petitions that it was well understood that the redress to be granted would not be given by the king in person, but that he would, by letter, direct his chancellor to bring the parties before him, hear their causes of complaint and enter the proper decree in the premises.

One of these petitions begins as follows:

"TO OURE LIEGE LORD THE KYNG.

Bysechith mekely zoure (yours) pour prest Roger Wodehill person of strete som tyme clerc of zoure faders Spicerie, whose soule God assoille, etc." Here follows a statement of his grievances against "the abbot and convent of Glastonbury," and concluding with the following prayer:

"That it like to zoure graciouse astate considere the grete power and rychesse of the forsaid Abbot and the convent, and the mene power of the said person; and comand to write to zoure chanceler of Yngelond to do clepe (bring) the parties afor him and examine them and make an ende by twene them of all that hangith bitwene them in zoure Courtys, and so that the forseid person have rizth for the mercy of Crist."²

In response to his petition the king wrote his letter addressed: "To ye worshipful Fader in God oure right trusty and welbeloved the Bisshop of Duresme Chancell'r of England," in which, after referring to the enclosed petition, he says:

"Wherefor we wol, that the forsaide supplication wel understanden and considered by yow, ye doo calle before yow bothe parties speciffied in the same supplication, and thaire

¹ Vol. 1, p. 85.

² Ch. Cal., vol. 1, p. 16.

causes herd, that ye doo unto hem both right and equite, and in especial that ye see that the pover partye suffre no wrong, but that ye make suche an ende in this matiere that we be no more vexed hereafter with thaire complaints. And God have yow in his keping."¹

On the next page we find a long petition to the king by one "Rauf atte Ree," tenant of our lord the king, complaining bitterly of "certain grete wrongs and griefs doon unto him," by one Tyrell, upon which the king addressed a similar letter to his chancellor to that given above, using many of the expressions exactly as given, and all to the same purport — that upon full information of the truth of matters set out in the supplication, that the chancellor was to see that he "have al that he ought to have of right, . . . and suffreth no man to do hym wrong in no wyse, touching the matter contened in his said supplication, etc.," and "so that he have no cause for lak of right to retourne hider ayein unto us compleyning."

This practice of appealing direct to the king for *equitable* relief against the rigor of the law, or in cases where the law furnished no adequate remedy, seems to have been resorted to in the remotest period of English history. Thus Spence, commenting on the judicial authority of Anglo-Saxon kings, says: "Besides the jurisdiction which was exercised by the king in his court, or by his councils, he appears to have exercised a kind of *equitable* jurisdiction for mitigating the rigor of the positive law laid down in the codes, when its strict execution in the particular case would have operated injustice. Thus, it is declared by the code of Edgar, that if the law were too heavy, a mitigation might be sought from the king."²

Harrison says that this was the custom in the times of the Saxons and of the Danes, that the king by himself did hold a high court of justice, wherein he sat in person, and did judge not only according to law and mere rights, but also after equity and conscience; and this is confirmed by the law of the Saxon King Edgar, viz: "Let no man seek to the king in matters of variance, unless he cannot find right at home; but if the right be too heavy for him, then let him seek to the king to have it lightened." And a similar rule is found also among the laws

¹ Id.

² Eq. Jur. of the Ct. of Ch., vol. 1, pp. 77, 79.

...the Dane.¹ He further adds that this was also the case after the dissolution of the *Aula Regis* in the reign of Edward I., as appears from Lambard, who in his *Archaion* says that matters of grace were only determinable by the king, or such as he appointed, and not in any fixed or established course of equity; so that those who sought relief in equity were referred to the king himself, who, being assisted by his chancellor and council, did mitigate the severity of the law in his own person, when it pleased him to be present, and did in his absence refer petitions sometimes to the chancellor alone, and at other times to the chancellor and some other of his council.² Spence tells us that "Edgar's successors, Anglo-Saxon, Norman and English, continued to exercise this jurisdiction, which is the germ of the jurisdiction of the court of chancery."³

§ 44. Petitions to king and council for remedy — Continued. — Kerly, referring to the judicial powers exercised by the king, the king's council and by parliament, says: "These judicial powers were the roots from which the chancellor's equitable jurisdiction grew, for the petitions craving their aid were continually referred to the chancellor for him to consider and answer, until the reference became so much a matter of course that parties indorsed their petitions over of their own motion, and the chancellor's power to grant relief in the nature of that granted by the king's council and parliament became so firmly established that petitions were addressed, in the first instance, directly to him."⁴

During the latter part of the thirteenth century the practice still obtained, where the subject claimed that he was without remedy in the ordinary tribunals of seeking relief by petition, and, for this purpose, he applied direct to the king himself, or to a full meeting of his council, or before a select body of councillors assigned to deal with such petitions as could be easily disposed of, or direct to the "king and his peers." The remedy was in general to send him to some tribunal which, acted by a writ out of chancery, to hear his claim, granted necessary relief, or, in other words, did what was right and

Occasionally the chancellor himself was directed to

¹h. Pr., p. 10, citing Sax. Laws, 108; Eleasmere, Hist. Ch. 22.

²Spence, *loc. cit.*

³Eq. Juris., pp. 20, 21.

bring the parties before him, hear their cause and do unto them both right and equity.¹ In 15 Rich. II. (1392), two such petitions were addressed to the king and the peers, and the answer to each was the same,—“that the petition be sent to the chancery,—the chancellor to hear both parties,—and further let there be done by authority of parliament that which right and reason and good faith and good conscience demand.”²

The reader will not fail to observe that this mandate of the king, turning the matter in dispute over to his deputy, the lord chancellor, for hearing, embodies in it many of the leading features of equitable practice; and is “in strict harmony with the history and present practice of the court. The bill is termed a *bill of complaint*; the parties are to be *summoned for examination*, the poor are to be protected, and the cause to be settled at once and forever.”³

§ 45. *Petitions to king and council for remedy* — Continued. — Long after the chancery was recognized as a court, and granted redress to parties who were without remedy at common law, the parliament and council still continued to exercise the same authority; in other words, the assumption of jurisdiction by the chancellor in such cases did not divest the parliament or council of their jurisdiction, upon the same principle that the jurisdiction of a court of equity still continues, notwithstanding courts of law have, by statute or otherwise, become vested with concurrent jurisdiction.⁴

Campbell says: For some ages these extraordinary applications for redress were received by the parliament, by the council, and by the chancellor concurrently. The parliament by degrees abandoned all original equitable jurisdiction, acting only as a court of appeal in civil cases, and taking original cognizance of criminal cases on impeachment by the commons; but it will be found that the council and the chancellor long continued equitably to adjudicate on the same matters, and

¹ Pollock & Maitland, Hist. Eng. Law, vol. 1, p. 176.

² Campbell, Lives Ld. Ch., vol. 1, 291, citing Rot. Parl., vol. III, 297.

³ 80 Law. Mag. 104.

⁴ Hess v. Voss, 52 Ill. 472, 476; McNab v. Heald, 41 Ill. 826, 330; Bab-

cock v. McCamant, 53 Ill. 214, 217; Labadie v. Hewitt, 85 Ill. 841; Hubbard v. U. S. Mortgage Co., 14 Ill. App. 40, 47; Payne v. Bullard, 55 Am. Dec. 74, 77; Varet v. N. Y. Ins. Co., 7 Paige, 560, 568; Story, Eq. Juris., § 64i.

that there were the same complaints and statutes against both.¹

The jurisdiction exercised by the king and his council was an equitable one. The sole ground of appeal to the king was the inability of the petitioner to enforce a right or obtain redress for a wrong in the ordinary courts established by the king for the administration of justice. Cases where these courts were unable to afford relief formed the exception to the rule; hence in the petitions to the king and his council it was customary for the petitioner to allege that he was *without remedy at common law* — a statement not, however, absolutely necessary, because, to justify interference on the part of the king, it was necessary for the petitioner to set out such a state of facts as to show that, unless the king granted his petition, he would be without relief. These petitions to the king and his council consisted of the following parts:

First. The address. *Second.* The introduction. *Third.* The grievance — statement of petitioner's case. *Fourth.* Allegation of absence of remedy at common law. *Fifth.* Prayer for relief desired. *Sixth.* Conclusion — promise to pray for his majesty.

The king's select or privy council sat in different chambers about the king's palace, such as the Painted Chamber, the Whitehall, the Chamber Marcolf; sometimes in the Star Chamber, and often in the Chancery.² "The king's council used to sit in different *chambers* that were about the palace; sometimes *en la chambre de peincte*; sometimes *en la chambre blanche*, or *en la chambre de marcolf*; and, as some say *en la chambre des etoiles*. . . . It very often sat in the chancery."³

La chambre de peincte, or "Painted Chambre," took its name from the fact that on its walls were painted a multitude of large figures representing battles. It is said that upon the walls of this famous palace of the king "all the history of the wars of the whole Bible are exquisitely painted, with most complete and perfect inscriptions in French." These paint-

¹ Ld. Cha., vol. 1, p. 9.

² Spence, Eq. Juris., vol. 1, 329.

³ Reeves, Hist. Eng. Law, vol. 2,

p. 415. As to the king's council being held in the star-chamber, see

4 Coke's Inst. 61.

ings were certainly as old as 1322, and probably older, and were found to be still there in 1800 upon removal of the tapestry with which the walls were hung.¹

§ 46. Petitions to king and council for remedy—Continued.—But there were “a vast number of petitions continually presented to the council, upon which they proceeded no farther than to sort as it were and forward them by indorsement to the proper courts, or advise the suitor what remedy he had to seek. Thus some petitions are answered, ‘this cannot be done without a new law’; some were turned over to the regular courts, as the chancery or king’s bench; some of greater moment were indorsed to be heard ‘before the great council’; some concerning the king’s interest were referred to the chancery or select persons of the council.”² Spence also gives us illustrations of these indorsements, “as follows: ‘sue at Common Law’ (that is by ordinary writ,) or ‘in the County or Hundred Court’; ‘sue in the Exchequer’; ‘sue in Chancery,’ that is in the ordinary common law court held before the Chancellor; . . . ‘a writ on the subject shall be dispatched out of Chancery’; ‘the King will consider’; ‘a remedy shall be provided,’ and the like.”³

The responses, as a rule, were in Norman-French. The following are given as examples:

“*Soit fait come il est desire.*”—To be done as desired.⁴

In other cases it was: “*Soit fait come il est desire en toutz pointz.*”—Let it be done as desired in all points.⁵

When the prayer of the petition was granted, the simple entry was usually: “*Le Roy le voet.*”—It is the King’s will.⁶

If the course of the common law was to be followed the entry read: “*Soit la Commune Leie tenu & gardee.*”—Let it be as the Common Law holds and provides.⁷

¹ Robinson’s Hist. Ch., p. 579, quoting from Penny Mag. for 1834, p. 458. In 1 State Tr., p. 65, this chamber is spoken of as “Saint Edward’s chamber, commonly called the Painted Chamber.” Quoted by Robinson, *loc. cit.* Called “*La chaumbre de Peinte*.” 2 Rot. Parl. 264, A. D. 1355.

² Hallam’s Middle Ages, cap. VIII, pt. 3; Hale’s Lord’s House in Parlia-

ment, 26, quoted in Marsh, Hist. of the Court of Chancery, p. 27.

³ 1 Eq. Juria, p. 880.

⁴ Temp. Henry VI., 5 Rot. Parl., pp. 326, 390, 394, 396, 397.

⁵ 32 Henry VI (1453); 5 Rot. Parl., p. 271.

⁶ Pet. to Henry V. (1418); Rot. Parl., vol. 4, p. 19.

⁷ Rot. Parl., vol. 4, p. 121.

When committed to the King's Council the indorsement read: "*Soit commis al Conseill le Roi.*"¹

If the prayer of the petition was denied on the ground that there was a remedy at common law the response was, "*Sue a cōe Lei.*"—Sue at common law.²

In one case we find this response in Latin to a French petition: "*Ad cōem Legem.*"³

In a case where the matter was reserved for further consideration, a translation of the French entry reads as follows: "The king wills that the records in a case like this in the time of his noble ancestors, if any there be, be searched. And on this, the king, by the advice of his council, will then order that which seems best in this case."⁴

But generally, when the matter was taken under advisement, no reason was given therefor, but the simple indorsement made in old French: "*Le Roy s'advysera*" — The king will be advised.⁵

Later on in the reign of Henry VI. (1425), we find the same entry in old English: "The king will be avysed."⁶

The first "Responsio" I have been able to find in English was in the reign of 2 Henry VI. (1423), and reads: "Be it ordeined as it is asked."⁷

Sometimes this old English is as difficult to make out as the old Norman French. For example, "by thadvys" must be read "by th' advys," or, by the advice, etc.⁸

The same or a similar course was adopted by the great council or parliament with petitions presented to it for relief. Spence says: "In cases not requiring special interference the same course seems to have been adopted as on the applications which were made to the council. If the matter were remediable at law, and there were no obstacle to the remedy being obtained, the petitioner was sent to the common-law courts; if it were a matter of revenue he was sent to the exchequer; if the matter related to the king's grants or other

¹ Rot. Parl., vol. 4, p. 50.

² 2 Rot. Parl. 415, 416; Edw. III, 1827-1877.

³ Id. 418.

⁴ Petition to Henry V. (1418); Rot. Parl., vol. 4, pp. 9, 10.

⁵ Id., p. 11.

⁶ Id., p. 290.

⁷ Rot. Parl., vol. 4, p. 256. The response to the petition on the next page is: "Be it as hit is axed."

⁸ 5 Rot. Parl. 9, A. D. 1439.

matters cognizable under the chancellor's ordinary jurisdiction, he was sent to the chancery."¹

§ 47. **Petitions to king and council for remedy — Continued.**— One of the earliest uses of parliament seems to have been the assisting the king in disposing of and answering the petitions which were presented to every new parliament. The increasing population and wealth of the country resulted in such a pressure of business that the parliament was forced to "resort to a system of delegation" to dispose of these petitions, just as the king was forced to appoint *deputies* to assist him in disposing of petitions presented to him in person. For we find a general provision as early as 8 Edward I. (1280) by ordinance, sending such petitioners to appropriate tribunals to be disposed of.

An ordinance of 8 Edward I. (A. D. 1280) throws much light on the manner of presenting petitions in *matters of grace* to the king, and their disposition. After complaining of the number of such petitions, most of which could be dealt with by the chancellor or judges, it provides that all petitions that touch the seal shall go first to the chancellor, and those that touch the exchequer to the exchequer, and those that touch the jurie to the justices of the jurie. And if the matters are so great, or so much of grace, that the chancellor and the others cannot do what is asked without the king, then they shall take them to the king to know his will, and that no petition come before the king and his council except by the hands of the said chancellor and the other chief ministers; so that the king and his council may be able, without the embarrassment of other business, to attend to the important business of his kingdom and his foreign lands.²

Kerly says of this ordinance that by it "matters of grace are distinctly reserved to be dealt with by the king himself," but I do not so understand it. It was by its very terms only matters that were "so great, or so much of grace," that were so reserved, and these could only go to the king by the hand of the chancellor. Certainly all questions of ordinary grace, that is, not involving grave questions of doubt, were to be solved by the chancellor.³

¹ 1 Spence, Eq. Juria 382. ² Kerly, Eq. Juria 26; Parkes, Hist. Chan. 22.

³ See 2 Stubbs, Const. Hist. 262, 263.

A further ordinance of the twenty-first year of the same reign (A. D. 1299) provided that these petitions should be carefully examined and divided into five bundles, containing severally the documents to be referred to the chancery, the exchequer, the judges, the king and council, and those which were to be answered, so that the matters referred to the king might be laid before him before he proceeded to transact other business.¹

We come now to the famous writ, issued by Lord Chancellor John de Offord in the king's name, to the sheriffs of London, in 22 Edward III. (1348), commanding them to make known how different classes of suitors were to obtain justice. It began by reciting that the king was much occupied with matters concerning the state, and his own business, and directing that all matters proper to be brought before him, whether relating to the common law, or to the special grace of the king, should be brought, the matters touching the common law before the lord chancellor to be disposed of by him, and the other matters touching the grant of the king's grace before the chancellor or the keeper of the privy seal, and that they or one of them should transmit to the king the petitions which they could not dispose of without consulting him, together with their opinion thereon, so that by reading it, and without it being necessary to make any further suit to the king, he might indicate his will in the matter to the chancellor or keeper of the privy seal, and that thenceforth no other business of the kind should be brought before the king himself.²

§ 48. **Early equity jurisdiction — Principal grounds of.**— Until the publication of the Chancery Calendars by the commissioners in 1827 it had been generally supposed that the whole structure of equity was founded on uses of lands, and to have had "but an imperfect foundation prior to the time of Elizabeth." The matter unearthed by the commissioners and

¹ 1 Camp. L. of Chs. 170; 2 Stubbs, Const. Hist. 262, 263. This ordinance was published, in the king's name, by Lord Chancellor John de Langton, immediately after his appointment. Id.

² For copy of writ in Latin, see 1

Camp. Ld. Chs. 236, note; and for the above summary I am indebted to Kerly, Eq. Juris 81. Lord Campbell says he presumes the common-law business referred to meant applications for original writs out of

chancery.

presented in these volumes shows that, "far from such restricted action, the chancellors were giving regular and constant relief in regard to all sorts and kinds of equitable subjects, and many not equitable, perhaps, at all, centuries before Elizabeth was born; in the times of Richard II., of the 5th and 6th Henrys, and Edward IV.; while they show also that there were fewer instances of application to the chancellor for relief on subjects connected with the 'uses' of land during the first four or five reigns after the equitable jurisdiction of the court was fully established than there were upon other subjects."¹

As is well said by Lord Campbell, "It is a great mistake to suppose that the clerical expedient of a conveyance to uses, for the purpose of evading the statutes of mortmain, gave rise to the equitable jurisdiction of the chancellor, or that he at first interfered only in cases of trust binding on the conscience. From the researches of the record commissioners it appears that his equitable jurisdiction was well established long anterior to the time when such cases came before him, and that the earliest applications to him for relief were from those who suffered by direct violence and the *combinations* of great men, against which they were unable to gain redress by the ordinary process of law."² He adds that the bill still alleges "combinations and confederacy,"—which allegation, if specially charged, ought to be denied by the answer.³

In the preface to the Chancery Calendars it is said that "the most of these ancient petitions appear to have been presented in consequence of assaults and trespasses, and a variety of outrages, which were cognizable at common law, but for which the party complaining was unable to obtain redress in consequence of the maintenance or protection afforded to his adversary by some powerful baron, or by the sheriff, or other officer of the county in which they occurred."⁴ The earlier

¹ Wallace, *The Reporters*, 461, 462.

² *Ld. Cha.*, vol. 1, p. 10.

³ *Id.*, note. The reader will remember the technical conclusion of every modern answer,— "And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged," etc. This goes into the

record whether there is any charge of "combination and confederacy" in the bill or not!

⁴ A want of space prevents me from giving much more than a bare synopsis of some of these early bills, but the reader who is curious to follow up the subject will find them in full in the authority cited, also syn-

the period at which the history of a country is examined, the larger the proportion of offenses committed with violence. Cunning shows itself at such times in stratagems of a warlike character. It is a strong hand, and not a fraud, which is most frequently employed in attacks upon property, until a period arrives in which considerable advance of education has taken place, and wickedness has attained new weapons in the powers of reading and writing. As a natural consequence, any tribunal which protects property during the infancy of a nation must exercise a criminal as well as a civil jurisdiction.¹ As we have already seen in this very class of cases, the subject, unable to obtain redress in the ordinary courts of law, appealed direct to the king in his council, and, to give such right of petition, it was only necessary to show that such appeal was necessary to prevent a failure of justice. The chancellor having been substituted for the king and his council, it was natural that he should take cognizance of this same class of cases

§ 49. Early equity jurisdiction — Principal grounds of — Continued.— The protection of the weak against the powerful, no matter whether the strength of the latter is the result of the superior intellectual endowment, or of cunning, or a combination of both, is yet one of the favorite sources of equity jurisdiction. Such protection was absolutely necessary in the early history of the court. The ignorant and the poor frequently found themselves absolutely without protection except by appealing directly to the king for help, the courts of common law being powerless in the premises. “The *judicium totius comitatus* was subject to the influence of a great man in the county; the greater the number of *sectatores*, the wider the range of his influence. The practice of amercing jurymen *quasi pro transgressione*, and of even imprisoning them, if refractory, afforded a further means of oppression. The ordinary judges became subservient to powerful men, and by delaying and protracting causes and trials, increased expense and vexation until the poorer class of suitors were brought to ruin. . . . The warlike, not to say predatory, habits of the day, and such practices as trial by duel and trial by

opsis of the same in the less expensive Equity. For review of this work see
 work of Seton, Early Records in 30 Law Mag., p. 95.

¹ 30 Law Mag. 97.

ordeal, all tended to augment the unfairness of judicial proceedings."¹ We are not, therefore, surprised to find that, whether the suitors presented their petitions to the king and his parliament, the king and his council, to the king alone, or to the "king in his chancery," such petitions "were frequently founded upon the poverty and defenseless position of the plaintiff, and upon the power and force of the defendant." The same remarks are true of petitions based on assaults and trespasses, remedies for which one would ordinarily suppose would be sought in the common law-courts; yet we find the complaining party seeking the aid of the chancellor on the ground that his opponent was under the protection of some powerful baron, or the sheriff or other officer of the county where the act was committed, and that for this reason his remedy at common law was not sufficient to insure redress of the wrongs complained of. These grounds of complaint were recognized as just cause for interference, on the part of the king, centuries before the establishment of the equitable jurisdiction of the court of chancery; hence, when the king began to turn suitors over to the chancellor for redress of their grievances, cases of this character were referred to him along with the others, and thus we find the jurisdiction of the chancellor and that of the king and his council to be the same; in other words, whatever constituted good cause of complaint to the "king and his council" constituted good ground of complaint to the "king in his chancery." This power of interference on behalf of the poor was one that was jealously defended by the king. The prayer of a petition to Henry IV. was as follows: "That all manner of personal actions between party and party, where the king is not a party, the same as heretofore shall be tried by the common law, and nowhere before the council of our lord the king by a writ of privy seal, or by any other false suggestion whatsoever, at the suit of the party, and that all personal actions so in times past depending before the council of Richard, late king, between party and party, and yet be discussed, shall be annulled and adjourned to the common law for God, and in the work of charity."

¹ 30 Law Mag. 99. See also upon Law, vol. 1, pp. 84, 85, 380; Id., vol. these subjects, Reeves, Hist. Eng. 2, pp. 114, 115; Id., vol. 8, p. 105.

To this petition the king gave the emphatic answer: "Let the statute thereupon made be observed and kept, except the one party be great and rich, and the other party be poor and not able otherwise to have remedy."¹ The want of an adequate "remedy at common law was the most comprehensive head of the ancient as it is of the modern jurisdiction in equity."

§ 50. Jurisdiction as affected by changed conditions of society.—The changed conditions of society have affected the jurisdiction of the court to this extent: That while the principle or basis of jurisdiction, viz., a want of an adequate remedy at common law, remains the same, the volume of cases justifying interference on this ground has constantly decreased. The education of the masses has steadily progressed, thus decreasing the intellectual difference between the rich and the poor; the enactment and enforcement of laws intended to redress violence and crime, the general recognition of the rights of all men, irrespective of their station or social position, together with the general and steady broadening of the power of the common-law courts, all have had their influence in decreasing the necessity of the chancellor's interference in this regard. The independence of judges is increased. Jurors are no longer coerced into unwilling verdicts by threats of or by actual imprisonment. These facts taken together "have placed parties, however different in rank and pecuniary circumstances, upon a footing of perfect equality in respect of the decision of the point in issue."

The reader can now well understand that, while the chancellor's *right* to interfere in a proper case still remains, the *necessity* for the exercise of that right has steadily decreased. Take this illustration as showing the truth of the statement that the spread of knowledge and greater enlightenment of the people lessens the necessity of the interference on the part of the chancellor. The chancellor of the time of Henry VI. recognized the right of a party to an injunction to prevent an irreparable injury. The chancellor and the people, from the king down, were firm believers in witchcraft; hence, if a party could establish the fact that a witch, by the power of enchantment, was about to commit against him an injury, irreparable in its

¹ 80 Law Mag. 101, citing Seton's Early Record in Ch., p. 22.

nature, his right to appeal to the chancellor for remedy was undoubtedly established. During the reign of Henry VI. (1422-1461), a poor lawyer, who was retained in a certain cause, doubtless by his zeal in behalf of his client, roused the ire of one Henry, a servant of the defendant, who, to revenge the cause of his master, threatened, by the aid of "witchcraft and sorcery," the lawyer's "nekke to breke," and, not only this, but, by the use of the same uncanny means, "hym endelese to destroye." These terrible threats proved too much for the nerves of the lawyer, and, to use his own words, "in as moche as the comyn lawe may nouzt helpe," caused him at once to appeal to the chancellor for protection against such "irreparable injury." Although he does not in terms pray for an injunction, yet he does ask the chancellor to compel the "saide Harry" to forsake his heresy, witchcraft and sorcery, and for such other remedy "that the suppliant may have hys pees," and all this "in the honor of God and in the way of cheryte." The record is silent as to the remedy applied by the chancellor, but, probably, when the defendant got out of "chancery," he had no greater admiration for the chancellor than he originally had for the lawyer. A modern chancellor might deem it just a trifle risky to measure arms with one who could call to his aid the "powers of darkness," but, doubtless, no such fears were felt by the judge in that case, for he was not only "chancellor of Engeland" but also a "reverend Holyfather" in the church. This case may not have been the first and probably was not the last of its kind, but certain it is that authority to grant injunctions against witchcraft is not recognized to-day as one now within the jurisdiction of the chancellor. For the amusement of the reader and as an illustration of petitions filed in the "King's Chauncerie," and also of the king's English of that period, this curious document is given in full, as nearly in the exact form of the original as can be, without having special type cast for the purpose:

*"To the ryght worthy & reverent Holyfader & h's g^acyous lord
My Lord of Bathe and Chaunceler of Engeland.*

Most mekely bysechit and full pytuously compleynyt yo^r
pore & contynuall bedeman Henr' Hoigges of Bodmyn of the
counte of Cornewayll, Gentilman, certefyying you g^acious lord
hov th' late on Richard Flamank of the said counte, squyer,

suwyd an oyer determyner ageyn Aleyn y^e Priour of Bodmyn of the said counte, so th^t yo^r said suppliant was w^holde as att^rney with the said Richard in the said mater: on s^r John Harry of the said toun of Bodmyn prest & serev^{nt} of the said priour, of hys malys & evele wylle, ymagenyng by sotill craftys of enchauntement wycchecraft & socerye, malygnyd yo^r said suppliant endeles to destroye thurz wechecraft abowesaid, he brake his legge, and foul was hert; thurz th^e weche he was in despayr of his lyff: and moreover contynualy fro day to day the said sotill craft of enchauntement wycchecraft and socerye usyth & ocuppyth, & in opyn plac['] pronuncit, & to fore many other divers persones boldely avowith & wol stonde thereby; the weche th^t ys weel knowen to many folkys of the said counte. And more over in opyn plac['] saide th^t he wolde by ye said craft of enchauntement wycchecraft and sorcerye, wyrke yo^r said suppliant his nekke to breke, and hym endeles to destroye, with oute yo^r g^{ac}yous lordship eide & support. Plese on to yov g^{ac}yous lord of yo^r reverent paternyte, & of yo^r hye g^{ac}yous lordschip, to considere the gret myschef harme & damage y do un to yo^r said suppliant; & also the gret myschef th^t may falle to hym here after, & to all other th^t both suturs & atto^rneys in availe to our soveryn lord the Kyng, & to ther cliant in all maters as reson & consience askyt and requyryth; yn as so moche as th^e comyn lawe may nouzt helpe: th^t ye wold fuchesef of yo^r benygne g^{ac}ce to g^{ra}unte a writ of sub poena, dyret on to th^e said s^r John Harry, personally to apere a fore you on to yo^r g^{ac}yous presence, at a certeyn day lynyd up a certeyn payn, hym duwely to examyne of all said premys, ydo on to yo^r said suppliant ageyn all ryght and reson'. And moreover hym to swere to forsake his eresy wicchecraft and socerye, & also hym to redresse & reforme to a good lyf: & moreover hym to punysse in amendement & correccion of hys soule, yn exsample to all other of h^e secte. And so to ordeyne a deu remedye & a way after yo^r g^{ac}yous avys & dyscreSSION, th^t yo^r said suppliant may have hys pees, with damag & expenc' & th^t in th^e hono^r of God and in the wey of cheryte."¹

§ 51. The chancellor and the common-law courts.— While now and then the chancellor and common-law judges

¹ Hoigges v. Harry, 1 Ch. Cal. 24.

came into collision, yet there was not by any means the constant struggle between the two jurisdictions which is generally supposed. "At times," says Campbell, "from personal enmity, from vanity, from love of power, and love of profit, chancellors and chief justices came into unseemly collision, and in this warfare they resorted unsparingly to the artillery of injunctions, attachments, writs of *habeas corpus*, indictments, and *præmunires*. But, generally speaking, the common-law judges co-operated harmoniously with the chancellor, and recognized the distinction between what might fitly be done in a court of law and a court of equity. He sometimes consulted them before issuing a subpoena to commence the suit. In the hearing of causes, if not satisfied with the advice of the master of the rolls and the masters in chancery (his ordinary council), he was from the earliest times in the habit of calling in the assistance of some justices or barons; and questions of extraordinary importance he adjourned into the exchequer chamber, that he might have the opinion of all the twelve."¹

An impartial regard for the truth requires us to call attention to the fact that while the relations between the lord chancellor and lord justices were generally of the most pleasant character, yet now and then controversies arose between the chancellor and common-law judges that were carried on with bitterness upon both sides. It is said that Lord Chancellor Rotheram "stood in awe of the common-law judges," as they appeared to have formed a combination against him. In the year 1483 he granted an injunction after verdict in a case depending in the court of king's bench. This act was looked upon as unwarrantable by the lord chief justice, who asked plaintiff's counsel "if they would pray judgment according to the verdict?" but counsel declared their hesitation, being in dread of infringing the injunction. One of the judges suggested that "though the party himself against whom the injunction was directed might be bound by it, his counsel or attorney might pray judgment with safety." This was overruled, but the lord chief justice said "they had talked over the matter among themselves, and they saw no mischief that could accrue to the party if he prayed judgment, for the pecun-

¹ Ld. Cha., vol. 1, p. 11; Spence, Eq. Juris 382, 383.

iary penalty mentioned in the injunction was not leviable by law, so that there remained nothing but imprisonment;" and as to that he added: "If the chancellor commits any one to the Fleet, apply to us for a *habeas corpus*, and upon the return to it we will discharge the prisoner, and we will do all to assist you." Another one of the common-law judges, to avoid the threatened collision, said "he would go to the chancellor and ask him to dissolve the injunction;" but they all stoutly declared that "if the injunction were continued, they would notwithstanding give judgment and award execution," claiming much credit on their part for their moderation for not awarding damages for the loss occasioned by the chancery proceedings.¹

§ 52. **The chancellor and the common-law courts — Continued.**— Again in the seventeenth century, while Coke was chief justice and Ellesmere was lord chancellor, we find a renewal of this controversy as to how far a court of chancery might interfere with judgments at law,— a controversy which was carried on with so much bitterness and vindictiveness as to eventually require the interference of King James, who, by a royal decree entered by virtue of his "Princely Office," commanded his chancellor not to hereafter desist to give to the king's subjects "upon their several complaints, now or hereafter to be made, such relief in equity (notwithstanding any proceedings at the common law against them) as shall stand with the merit and justice of their cause."²

Coke, though learned in the law, was by nature "selfish, overbearing and arrogant," and, when engaged in what he believed the discharge of an official duty, he allowed these qualities to manifest themselves to such a degree as to render it difficult for his contemporaries to do justice to his great merits.³ Lord Campbell very justly observes that "a love of power, or of popularity, very easily deludes a judge into the

¹ Campbell, *Ld. Chs.*, vol. 1, p. 872, citing Year Book 22 Edw. IV., 37.

² 1 Rep. in Ch., Appendix, pp. 49, 50.

³ Wilson, in his *Life of King James*, speaking of Coke, says: "His Passions and Pride were so predominant, that Boiling over, he lost (by

them) much of his own fulness, which extinguished not only the valuation, but respect to his merit: So often it is that heat, that gives life to noble parts, by a circular Motion, the ruin of them." Kennett's *Hist. of Eng.*, vol. 2, p. 705.

conviction that he is acting merely with a view to the public good and under the sanction of his oath of office, when he is seeking unwarrantably to extend the jurisdiction of his court.”¹ A full knowledge of his great reputation for learning, a consciousness of his own personal integrity, together with his natural independence of character, caused the chief justice to engage in controversies where a more prudent and timid man would have hesitated to venture. Having upon previous occasions escaped being called to account for the stubborn and dogged stand taken by him in matters affecting the crown, he fondly conceived the idea that he “never could be in jeopardy.” It is only by a consideration of these matters that we are fully enabled to understand the causes that led him to engage in a bitter controversy with Lord Chancellor Ellesmere,—a controversy in which the chief justice was humiliated by defeat, and which, in the end, cost him his official head. The chancellor was believed to be dying. “The chief justice deemed this a fit opportunity to revive the dispute between the courts of common law and equity,—denying that the chancellor had any right to interfere by injunction with an action in its progress,—and insisting that the suing out of a *subpœna* in chancery, to examine the final judgment of a court of common law, was an offense which subjected all concerned to the penalties of a *præmunire*.”² Taking this stand, he boldly defied the chancellor by entering a judgment in one case in the teeth of an injunction, by discharging a defendant, in another case, who had been committed for contempt in violating an injunction against suing out an execution, and in other ways calculated to bring on a direct conflict between the two courts. The chancellor, though greatly annoyed by the hostility of the common-law judges, persisted in granting relief in this class of cases whenever the occasion arose.

§ 53. The chancellor and the common-law courts — Continued.—We come now to a “battle royal” which was fought to a finish and forever settled this mooted question — a battle in which the chancellor, the king’s attorney-general, Bacon (a bitter enemy of Coke), the king and others were arrayed upon the one side, and the common-law judges, led by

¹ *Lives of Ld. Justices*, vol. 1, p. 289. ² *Campbell, Ld. Chs.*, vol. 2, p. 386.

Chief Justice Coke, upon the other,— a contest ending, as one might well have foreseen, in the complete triumph of the lord chancellor and the placing of this branch of equity jurisdiction upon a solid basis; although it is proper to add that feeble attacks were made upon it down as late as 1695. It was in that year that Lord Chief Baron Atkyns published his elaborate treatise in support of Lord Coke's doctrine, which, however, had no effect in shaking the jurisdiction of the court of chancery in this regard settled by the decree of the king in the beginning of that century.¹ The question arose in this way: A judgment was fraudulently obtained in the court of the king's bench, which judgment was set aside by the chancellor and the execution perpetually enjoined. The plaintiff in the suit at law was guilty of gross and outrageous fraud by inveigling the defendant's witness into an alehouse and plying him with drink at the moment when the case was called. Just as the plaintiff left the witness the latter had a pottle² of sack to his mouth, so that in reply to the defendant's request for a few minutes' time, the rascal was enabled to swear "that delay would be vain, for that he had just left the witness in such a condition that *if he were to continue for a quarter of an hour longer he would be a dead man.*" By this witness the defendant could have established his defense of payment. Wilson gives the following quaint statement of the facts of this case: "Sir Edward Coke had heard and determined a Cause at Common Law; and some report, there was jugling in the Business. The witness that knew and should have related the Truth, was wrought upon to be absent, if any Man should undertake to excuse his Non-Appearance. A pragmatikal fellow of the party undertook it; went with the witness to a Tavern; called for a Gallon-pot full of Sack; bid him drink; and so leaving him went into Court. This witness is called for as the Prop of the Cause; the Undertaker answers upon Oath, *he left him in such a condition that if he continues in it but a Quarter of an hour, he is a Dead Man.* This Evidencing the Man's In-

¹ Campbell, *Ld. Chs.*, vol. 2, p. 390, note. See also all authorities collected by Mr. Hargrave in his *Life of Lord Ellesmere*, *Biog. Brit.*, vol. 5, p. 574.

² A pot or mug; a liquid measure of two quarts. Falstaff says to Mrs. Quickly: "Go brew me a pottle of sack finely." *Merry Wives of Windsor*, act III, scene 5.

capability to come, deaded the matter so, that it lost the Cause.”¹ The decree of the chancellor aroused the ire of Lord Coke, who resolved to put a stop to such interference, and to this end did everything in his power to secure the indictment of the plaintiff in the chancery case, his counsel and even the master in chancery, who advised the chancellor in the matter, insisting that they were guilty of a *præmunire* under statute 27 Edward III., c. 1, and also contending that such interference was prohibited by 4 Henry IV., c. 23.² At the following Hilary Term, one of the judges, at the instigation of the chief justice, charged the grand jury “to inquire of all such persons as questioned judgments at law, by bill or petition in the court of chancery.” The jury hesitated, begged for further time and asked for counsel in the matter, and offered other excuses to the court, whereupon the chief justice stormed at them, threatening them with a commitment if they refused to find the indictments, but it was all to no purpose, for the jury, “having a wholesome fear that to be employed as a weapon in the contest between the chancellor and chief justice would bring but little profit and much danger, declined to follow his advice.”³ On the same day a motion was made concerning another judgment.

§ 54. **The chancellor and the common-law courts — Continued.**— This was too much for the chief justice, who thereupon proceeded to give the following solemn and wholesome warning to the lawyers: “Take it for warning, whosoever shall putt his hand to a bill in any English court after a judgment at lawe, wee will foreclose him forever speaking more in this court. I give you a faire warning to preserve you from a greater mischief. Some must be made example, and on whome it lighteth it will fall heavy. Wee must looke about us, or the common law of England wilbe overthrowne.”⁴ The very time selected by the lord chief justice for bringing on this conflict proved in the end unfortunate, as the condition of the lord chancellor, he being then confined to his bed, excited sympathy and caused the attack on him to be “considered as the more reprehensible as an attempt to crush a dying

¹ Kennett's Compleat History of England, vol. 2, p. 704.

² Kerly, Eq. Juris. 118.

³ 2 Campbell, Ld. Chs., pp. 888, 889.

⁴ 1 Rep. in Ch., Appendix, p. 1.

rival." Bacon, the king's attorney-general, promptly gave information of the collision to the king, and the chancellor, who in the meantime had recovered, prepared a case and submitted the question, "Whether, upon an apparent matter of equity which the judges of the law by their place and oath cannot meddle with or relieve, if a judgment be once passed at common law, the subject shall perish, or that the chancery shall relieve him? and, whether there be any statute of *præmunire*, or other, to restrain the power in the chancellor?"¹ The king, "taking himself to be the judge of the jurisdictions of his courts of justice, did seriously advise thereupon with his council;"² that is, the king referred the question to his attorney-general, Bacon, Sir Henry Montagu and Sir Randolph Crew, "the king's sergeants, and Sir Henry Yelverton,"³ who made a full and exhaustive report thereon, and upon "whose opinions and certificate, he did give judgment for the chancery; and accordingly all things were in peace."⁴ The king ordered "that the whole proceedings therein, by the decrees formerly set down, be inrolled in Chancery, there to remain of Record, for the better extinguishing of like Differences and Questions that may arise in future Times."⁵ Bacon, for the time being content with the defeat of his distinguished rival, opposed his dismissal from the office of chief justice; but, afterward, Coke in another case refusing to bow at the dictation of King James, Lord Ellesmere and Bacon together secured his removal. Not satisfied with this, however, Lord Ellesmere, perhaps prompted by Bacon, contrived to give to his defeated enemy a final back-handed lick. It being the duty of the chancellor to install Sir Henry Montagu as the successor in the office of chief justice, he could not let the opportunity pass without insulting his fallen foe by calling attention to his supposed faults and warning the new chief justice against them.⁶ Of this Lord Campbell remarks that "it may be con-

¹ Id., p. 389, citing 5 Bacon's Works, p. 416.

² 1 Rep. in Ch., Appendix, p. 1.

³ Kennett, Hist. of Eng., vol. 2, p. 704.

⁴ 1 Rep. in Ch., Appendix, pp. 1, 2.

⁵ Id., p. 50. In this volume, Ap-

pendix, pp. 1-88, will be found the full proceedings.

⁶ Campbell, 2 Ld. Cha., p. 398, gives the address of the lord chancellor, delivered upon this occasion, in full.

sidered as Ellesmere's dying effort" and "shows that he had neither remitted his desire for vengeance nor of punishment."¹ Yet after all, as it turned out, Coke had the last word. Lord Campbell says that, being convinced against his will, he retained his opinion, and in his "Third Institute" he stoutly denies the jurisdiction of the chancellor on this subject, which he maintains is contrary to 27 Ed. 3.² The passage referred to is as follows: After quoting the pretended authorities against the jurisdiction of the chancellor in such cases, it is added: "See a privy seal bearing teste 18 Julii, anno domini 1616, to the contrary, obtained by the importunity of the then lord chancellor being vehemently affraid: *sed judicendum est legibus*, and no president can prevail against an act of parliament."³ While Campbell and others⁴ have held Coke responsible for this parting kick at the dead chancellor, yet there is a question as to its correctness. Ellesmere died March 15, 1617, and Coke on the 3d day of September, 1632. The third part of the Institutes was not published until 1644, or twelve years after the death of the author. In the absence of any evidence of the fact, we might safely surmise that the manuscript was dressed up before publication, but upon this point we have direct proof. In the full proceedings of this famous controversy, found in 1 Rep. in Ch., Appendix, in speaking of this passage from Coke, the author lays the blame on the publisher, who, finding "some old notes collected when the question was on foot and undecided hath taken the boldness to print them long after the author's death." Of this passage from Coke it is there further said that it showed little charity to the lord chancellor, long since dead, "that he should be said to have procured that judgment by importunity, being vehemently afraid though 'tis more probable the fear was elsewhere." Marvin tells us that the second, third and fourth Institutes were published by order of the House of Commons, and that "they did not receive the finishing corrections of their author, and for this reason considerable allowance should be made, for 'we know not what injustice has been done him by the publishers of his orphan labours.'"⁵

¹ Id., pp. 397, 399.

² Id., p. 390.

³ 3 Inst., p. 125.

⁴ Kerly, Eq. Juris. 115.

⁵ Legal Bibliog. 208. This sketch of the controversy over the jurisdic-

lord chancellor in another; but always a *memorandum* of the delivery thereof entered upon the close rolls."¹

While ordinarily the lord chancellor was the keeper of the great seal, yet not infrequently there existed, concurrently with the lord chancellor, a "Keeper of the Great Seal;" yet that upon the lord chancellor was devolved generally the duty of lord keeper is also attested by the fact that "in the entries in the Rolls, a reason is generally assigned for the appointment of these keepers,—as that the chancellor was going to the Earl of Lancaster at Kenilworth on the king's business,—or was absent from court about his election to his diocese,—or was employed on a foreign mission for the king."²

Sometimes it happened that there was for a time no lord chancellor, and yet it was necessary that, during such time, writs and other documents should be attested by use of the great seal. During such time the great seal was placed, according to modern phraseology, "in commission," that is to say, certain persons, usually three in number, were appointed to have the custody of the great seal for the despatch of business connected with it. It was generally to the master of the rolls and two other masters in chancery that it was so entrusted.³ This might be brought about by the death of the chancellor or vacancy in the office from any other cause. Sometimes when the lord chancellor was compelled to be absent he delivered a silver seal to the master of the rolls "for the sealing of writs and dispatch of any other necessary business." In such cases the master of the rolls was merely considered the deputy of the lord chancellor.⁴ In 1320, when King Edward II. was going into France, the chancellor sealed up the great seal and delivered it to the king, and "gave the little seal to the master of the rolls, to be assisted by Robert de Bardeley and William de Clyff."⁵ Sometimes in case of the lord chancellor's sickness the great seal was delivered up to the king, who entrusted it to such persons as he thought fit, to be used for sealing writs and other documents.⁶

¹ 1 Hale, P. C. 170.

² Campbell's *Lives of the Lord Chancellors*, vol. 1, p. 189.

³ Campbell, *Ld. Cha.* (Boston ed.), vol. 1, pp. 20, 233, 334.

⁴ *Id.*, pp. 189, 192, 325.

⁵ *Id.*, p. 191.

⁶ *Id.*, p. 192.

When the king went beyond the limits of the realm the chancellor delivered the great seal to the king, and another seal was delivered to the chancellor to be used by him in the king's absence. Upon the king's return the great seal was given back to the chancellor and the other seal taken up.¹ In one instance at least, sheer ignorance of the duties of the office on the part of the chancellor was the cause of the great seal being placed "in commission." In 1544, under pretense that Lord Wriothesley, the chancellor, "was so continually employed by the king's commandment about his weighty affairs that he was not sufficient to dispatch, hear and determine the causes depending in chancery," the great seal was given in commission to Sir Robert Southwell, master of the rolls, and to three other masters.² Campbell, giving as the true reason for this act, says that the chancellor, wholly ignorant of his duties, "tried to gain information from the officers of the court to qualify him for the more satisfactory performance of his part in 'the marble chair,' but, as Michaelmas Term approached, his heart failed him," and, for this reason, with the king's consent, he issued the commission.³

§ 57. Number of seals.—While, as a rule, but one great seal was delivered to the lord chancellor as a symbol of his authority and for use in sealing the king's writs and other documents, there were exceptions to this rule. We sometimes find that two or three seals were delivered at once by the king to his deputy, but this was in rare instances only. The books speak of the king having three or four seals, but a careful examination shows that he had as many lord chancellors, and that he only delivered one seal to each, a different seal being engraved for each new chancellor. Where several seals were delivered at one time they were identical in form, that is, they made the same impression, the only difference being in size or material.

"I finde that King Hen. 5, had two great seals, one of gold, which he delivered to the bishop of Duresme, and made him

¹This was done when Edward III. went to Brittany in 1342. Campbell, *Ld. Cha.*, vol. 1, p. 882.

²Robinson's *History of the Court of Ch.*, p. 1056.

³*Lives Ld. Cha.*, vol. 2 (Boston ed.), p. 128. Robinson, *loc. cit.*, quoting from *Leg. Jud. in Ch.* (ed. 1827), pp. 149, 150, gives this commission in full.

lord chancelour, and another of silver, which King Hen. the 5 delivered to the bishop of London to keep.”¹

During the reign of Henry VI. the lord chancellor had three great seals — one of gold, one broad seal of silver, and the other a silver one of less size. Upon the death of the lord chancellor these three great seals were immediately locked up in a wooden chest, sealed by the lords present and so conveyed into the treasury. From thence this wooden chest was brought to the king, who, upon the appointment of a new lord chancellor and after the administration of the oath to him, took the great seals from the wooden chest, and delivered them to the new lord chancellor in the presence of the nobility. The latter put them again into the wooden chest, sealed it with his own seal and sent it to his home, where, before certain nobility, he caused the king’s letters-patent and writs to be sealed with them, and his installation was complete.²

Sometimes two great seals were engraved, one to be kept by the king and the other to be delivered to the lord chancellor, or other keeper. Thus we are told that “Antiently, when the king travelled into Normandy, France, or other foreign kingdoms, upon occasion of war or the like, there were two great seals, one went along with the king and the other was left with the *custos regni*, or sometimes with the chancellor, if he went not along with the king, for the dispatch of the affairs of the kingdom, and then the king upon his return sometimes redelivered the old seal and took in the new.”³

§ 58. Its delivery to the chancellor.—The great seal was delivered in person by the king to the lord chancellor or other party intended to be charged with its custody and to have the authority to use it in the sealing of writs, patents, and other documents. And in case it was delivered to the lord chancellor, it constituted the only evidence of his authority, and, as we have already seen,⁴ other writ or authority had he none. The ceremony of the delivery of the great seal was an imposing one, as has already been fully described, and an entry was made in the Close Rolls of the fact of its delivery.⁵

¹ 4 Coke, Inst. 87.

⁴ *Ante*, § 9.

² Camden, Britannia (2d ed.), vol. 1, col. cclvi.

⁵ *Ante*, § 9, where will be found a translation of one of such entries.

³ 1 Hale, P. C. 171.

When the king died, though the office of keeper of the great seal expired, yet the great seal of the last king continues the great seal of England till another was made and delivered.¹ When the new seal was provided and ready for use a proclamation was delivered to all the sheriffs of England signifying that the new great seal was ready for use and an impression in wax of the new seal was sent to them, and they were commanded that after a day named they should receive no writs but those under the new seal. On the next day after the sealing of writs with the new seal began, the old seal was broken. The great seal of Edward II., which had likewise been that of Edward I., continued to be used until the 5th day of October, 1327, when a new great seal, with the effigies and style of Edward III., was put in the hands of the chancellor.² Edward III., who began his reign on the 25th day of January, on the 3d of October following, directed a proclamation to all the sheriffs of England, signifying that he had made a new great seal, sent them an impression of the new seal in wax, and commanded them, after the 4th of October, to receive no writs but under the new seal. On the 4th of October, being Sunday, the Bishop of Ely, chancellor, producing the new seal, declares the king's pleasure, that it should be from thenceforth used; the Monday after the old seal is broke, *præcipiente rege*, and the pieces delivered to the Spigurnel.³

When Nicholas de Ely was installed as chancellor (1260), the old great seal was broken in pieces and a new one delivered to the chancellor. A circumstantial account of the ceremony says that "the king delivered the pieces of the old broken seal to Robert Wallerand, to be presented to some poor religious house of the king's gift."⁴

Upon the making of a new great seal after the death of the reigning sovereign, or for other reason, the old seal was broken up or defaced. A record of the breaking up of, or defacing, the old seal and the delivery of the new was duly made. Lord Hale says: "There is or should be always a *memorandum* upon the close rolls of the breaking of the old seal and mak-

¹ Hale, *Pleas of the Crown*, 175. place was to seal the king's writs.

² Campbell's *Ld. Chs.*, vol. 1, p. 202. *Post*, § 60.

³ *Pleas of the Crown*, pp. 176, 177. ⁴ Campbell's *Ld. Chs.*, vol. 1, p. 148.
The Spigurnel was an officer whose

ing and delivery of the new.”¹ This entry was made on the back of the close roll.² He further adds: “The great seal, which Mathew Paris, *sub anno* 1250, calls *Clavis Regni*, hath been with great care and solemnity kept and used, and therefore antiently, when there was any change made of the great seal, there was not only a *memorandum* made thereof in *dorso clausorum cancellariæ*, and a public notification thereof in the court of chancery, but public proclamation was made thereof.”³

§ 59. Accidents connected with it.—Notwithstanding the “great care and solemnity” with which the great seal was kept, now and then some misfortune befel it, so that the care of it must have been a constant source of anxiety to the lord keeper, or other party having its custody.

In March, 1784, London was thrown into consternation by the report that the great seal had been stolen from the lord chancellor, and it was at once charged that the whigs had burglariously entered the house of the lord keeper and “feloniously stolen and carried off the *Clavis Regni*,” and that this was done to prevent the dissolution of parliament.

The truth was, that early on the morning of March 24th, thieves, coming from the fields, climbed over Lord Thurlow’s garden wall, and forcing the bars of the kitchen window entered the study of the lord chancellor, and from thence, while that worthy dignitary was sound asleep, sneaked out carrying with them two silver-hilted swords, a small sum of money and the great seal, the latter inclosed in the two bags so often described in the Close Roll,—one of leather, and the other of silk. No trace of the missing articles was ever obtained, although a reward was offered. The lord chancellor, upon awakening and discovery of the theft, with Mr. Pitt, at once waited upon the king and communicated the intelligence to him. A council was immediately called and an order entered reciting the loss of the great seal, and directing the chief engraver of seals to immediately prepare a great seal of Great Britain with the following alterations:

“That on the side where his Majesty is represented on horseback, the number of the present year 1784 be inserted in

¹ 1 Pleas of the Crown, 170.

² Id. 171.

³ Id. 172.

figures on the plain surface of the seal behind his Majesty; and the herbage under the horse's hind legs omitted."

"That on the reverse, where his Majesty is sitting in state, the palm branch and the cornucopia be omitted on the side of the arms at the top; and over the above arms the number of the present year 1784 in figures to be instead, and at the bottom also the present year MDCCLXXXIII. in Roman figures."

By the order it was further provided that the engraver "present the same to his Majesty at this board to-morrow for his royal approbation." At noon on the following day the new great seal, "finished in a rough fashion," was delivered to the king. The latter immediately delivered it to the lord chancellor. His Majesty at once proceeded to the House of Lords and there, his lord chancellor standing on his right holding the new great seal in the old purse, read an order ending the session and recurring as speedily as possible to the sense of his people by calling a new parliament.

On the 2d of April following, this make-shift seal was ordered to be replaced by a new great seal, and on the 14th of May the king's council approved the engraver's draft and directing it to be engraved at once. Nearly a year was employed in the engraving, as we find that on April 15, 1795, the make-shift seal was delivered up to and defaced in his Majesty's presence and the new great seal delivered to the lord chancellor.¹

During the absence of Richard I. on the Crusade, he left Longchamp in England and took with him his vice-chancellor, Malchien, who was drowned in the Mediterranean Sea near Cyprus with the great seal hung around his neck.²

There are other instances of the loss of the great seal by being thrown into the water either accidentally or otherwise. Lord Campbell tells us that on the execution of Charles I. the prince took upon himself the royal title and had a great seal engraved, which he took with him to Scotland where he was crowned king. After the battle of Worcester this great seal was lost, and he adds:—"It was probably thrown into the

¹Campbell's *Lives of the Lord Chancellors*, vol. 7, pp. 88-90.

²Green Bag, vol. 10, p. 247; Campbell, *Lives Ld. Chs.*, vol. 1, p. 114.

Severn, that it might not be sent to the parliament as a trophy of Cromwell's victory."¹

James II. threw his great seal into the Thames when he heard of the successful landing of the Prince of Orange at Torbay, thinking, perhaps, as Lord Campbell says, that "he had sunk with it forever the fortunes of the Prince of Orange." This great seal, the *Clavis Regni*, the emblem of sovereign authority, was afterward found in the net of a fisherman near Lambeth, and delivered by him to the lords of the council, who were resolved to place it in the hands of the founder of the new dynasty.²

§ 60. Sealing.—The lord chancellor did not do the sealing in person, but he "sealed all things by the hands of a clerk who carried the king's seal."³ The actual sealing of the king's writs was performed by an officer called the *spigurnel*; and when the old seal was broken up, upon the production of the new, it seems the pieces were delivered to this officer.⁴

Tomlin, in his Law Dictionary, gives two origins of the name of this officer: first, from the Saxon *spicurran*, to shut up or inclose; second, from *Galfridus Spigurnel*, appointed by Henry III. to be the sealer of his writs, he being the first in that office.

In addition to the *spigurnel* — the officer who did the actual sealing — there was another who assisted him, and whose duty it was to fit the wax for sealing.

Among the officers of the court of chancery Camden mentions a "sealer and *chauffwax*."⁵

Tomlin in his Law Dictionary writes it *chafewax*, and defines it as an officer in chancery, that fitteth the *wax* for sealing of the writs, commissions, and such other instruments as there made to be issued out. This word is derived from *chauffer*, old French, to heat, to warm, to make hot.⁶ The office was abolished by Stats. 15 and 16 Vict., c. 87, § 23.

While the actual sealing was done by these officers and not by the lord chancellor or other keeper of the great seal, it was done in his immediate presence and under his supervision. But, while the sealing was under the personal supervision of

¹ Lives Ld. Chs., vol. 3, p. 895.

² Lives Ld. Chs., vol. 4, p. 881.

³ Camden, Britannia (2d ed.), vol. 1, col. colv.

⁴ 1 Hale, P. C. 176; Cambd. Remains, p. 126.

⁵ Britannia (2d ed.), vol. 1, col. colvi.

⁶ Century Dic.

the chancellor, he was assisted in the discharge of this duty by the masters. We are told that "another part of the service was to assist the chancellor alwaies at sealinge times; and in his absence or sickness they had the over-lookinge and direction of the same themselves, as maye be evidentlie and plentifully proved out of the records of the court."¹ Upon such occasions the seal was delivered into the custody of one of the masters "to be kept under the seales of two of the masters of the court."²

Lord Campbell says, after the court of chancery ceased to follow the king, and became permanently located in Westminster Hall, that the "chancellor, on account of his superior dignity, had placed for him a great marble table, to which there was an ascent by five or six steps, with a marble chair by the side of it. On this table writs and letters patent were sealed in the presence of the chancellor sitting in the marble chair. Here he received and examined the petitions addressed to him. On the appointment of a new chancellor he was inaugurated by being placed in this chair."³

Some idea of the amount of labor involved in the sealing of writs, patents and other documents may be derived from the fact that it required four hundred pounds of wax a month, or a ton every five months.⁴

X. THE BILL IN CHANCERY.

§ 61. Evolution of the bill — Its origin.— We have already seen that the chancellor, while in the exercise of the equity jurisdiction of his office, was but the deputy of the king, discharging duties formerly devolving upon the latter, and that, as petitions to the king increased in number, the king, as a matter of convenience or necessity, turned them over to his deputy —

¹ Treatise of the Maisters of the Chauncerie, Hargrave's Law Tracts, 307.

² Id. 307, 308.

³ Lives of Ld. Chancellors, vol. 1, p. 206. The reader who has the curiosity to follow the subject of the great seal further should consult Sir Walter De Gray Birch's Synopsis of Great Seals; also, the Great Seals of England,—the joint work of his majesties' engravers, the brothers

Alfred B. Wyon and Allan Wyon. He will also find in the Green Bag, vol. 10, pp. 245, 293, a finely illustrated article, giving cuts of great seals from that of King Offa, A. D. 790, to Queen Victoria.

⁴ Green Bag, vol. 10, p. 301. As to the vast number of documents whose authenticity were required to be attested by the great seal, see ante, § 35.

the chancellor—for disposition, and that this practice becoming almost a matter of course, suitors began addressing their petitions directly to the lord chancellor. Keeping these facts before us, we are prepared to understand the form of a bill in chancery, and make many things clear which otherwise would be incomprehensible. The bill in chancery was, and still is, but a petition to the king, addressed to the chancellor. Even petitions to the king, or to the king and his parliament, were called bills;¹ hence the origin of the term *bill* in chancery.

To show that the modern bill in chancery is but an adaptation of the ancient petition to the king and his council, or the king and his parliament, the following illustrations are subjoined, giving a skeleton only of the address, prayer and conclusion.

§ 62. *Petition to the king.*—That the bill of complaint presented to the chancellor seeking relief for a grievance followed the form of petitions to the king and his council is shown at a glance by a comparison of these documents. Take, for example, the following petition addressed to Henry IV. (1399–1413):

“*A nre ts excellent t ts redoute Sr. nre Seigno^r le Roy.*” This address is followed by a statement of the grievance sought to be remedied, to which is added the following prayer: “*p^r Dieu t en oever de Charitie. . . . consideraunt ts g^rcious Seigno^r q les ditz suppliantz sont si poveres q'ils ne p^r. ount endurer lez costages p^r avoir remedye p la comune ley.*”²

“To our very excellent and very invincible Lord our Lord the King. . . . for God and as a work of charity, . . . considering very gracious Lord, that the said suppliants are so poor, that they are not able to endure the costs of a remedy at the common law.”

Jahne Glyn, a widow, presented a petition to the Commons, Edward IV. (1472–1473), as follows:

“*To the right, wise and discrete Commons in this present Parlement assembled:*

“*Mekely besecheth and pitously complayneth, your poor Bedewomman³ Jahne Glyn widowe, etc.*”

¹ West, *Symbolography*, Pt. 2, from Proceedings of the Privy Council, vol. 11, p. 110.
§ 166; 5 Rot. Parl. 890, 894, 897.

² Kerly, *Eq. Juris*, P. 16, quoting ³ Bedewoman is from the Anglo-

Here follows statement of her grievance, after which the prayer begins:

"Please it therefore your grete wysdomes the premises tenderly to conside, etc."

Then concludes:

"And your said Besecher shall ever pray to God for you."¹

"To his most excellent and most invincible Lordship, our most sovereign Lord the King."

"Besecheth most humbly your poor and continual Orators, the Dean & Chapter of the Cathedral Church of Chichester, founded by your most noble ancestors, and enjoys your patronage; That whereas you most gracious Lord later by your Letters Patent, of your especial grace, certain knowledge, and proper motion, have given and granted to said suppliants, &c."

Here follows a statement of the subject-matter of the petition, to which is added the prayer, beginning:

"May it please your most sovereign and most gracious Lordship, at the reverence of God, and in the full accomplishment of your said most noble and most devout purpose, etc."

And ending:

"And this for God, and in work of charity."²

Elizabeth Sotehill, also at the same parliament, presented her petition as follows:

"To the Kyng oure Liege Lord;

Humbly besechith youre Highness, your humble Subgict, true Liege Woman and Bedewoman Elizabeth Sotehill."

Here follows statement of her grievance and there is added her prayer for redress:

"Please it your Highnes, of youre moste haboundaunt grace, by the advice and assent of Your Lordes Spirituelx and Temporelx, and the Comons, in this youre present Parliament assembled, etc."

The petition then concludes:

"And youre seid Suppliant and poure Oratrice, duryng her lif shall daily pray to God for the preservation of youre moste noble and roiall estate."³

Saxon *bead*, old form *bede*, a prayer, a petition. Tomlin's Law Dic. Hence *bedeman* or *bedewoman*, a man or woman who solicits alms, promising, in return, to pray for the donor.

Bedehouse, an alm-house, is from the same root. Century Dic.

¹ Rot. Parl., vol. 6, 85, 37.

² Rot. Parl., vol. 5, 48.

³ Rot. Parl., vol. 6, 175, 176.

§ 63. **Early bills in chancery.**—The following synopsis of several early bills in chancery shows how closely they parallel the foregoing petitions to the king or to the king and his council. During the reign of Richard II. (1377–1399), one Tregoy, of the county of Cornwall, filed a bill in chancery against the Earl of Warwick, charging that the defendant unlawfully arrested the plaintiff, threw him in prison and there detained him for a year and more, for which he prayed remedy. This bill, according to the practice at that time, was in Norman-French, the original of a part of which, with a translation, is as follows:

“A tsreverent S^r & pier en Dieu lerchevek d’Ewvyk & Chaunceler d’Englete:

Supplie humblement John Tregoy del counte de Cornewaill ovre povre servant & oratour q come le dite suppliant & touz ces auncestres de temps dount memorie ne court frankes homes & de frank condiconz estoyent & demrraunt en le dite counte de Cornewaill; ne q^{nt} Thomas Beauchamp count de Warwyk p male enformacon des enemys le dite suppliant surmettaunt le dit suppliant estre son nief app^rtenaunt a son maner de Carnanton en l’av^{nt}tdite counte luy prist & emprisona hors du dite counte & enprison luy ad detenue p une anne & pluis; &c.

Here follows balance of statement of facts relied upon, and then concludes with the following prayer:

Come vous voillez agarder qe plesaunce vous soyt d’ordeygner tiel remedie al dite suppliant en discharge de ces maymprise & en salvacon de son estat solonq vre t’ssage discrecon & droiturel jugement eiant regard qe le pier le dit suppliant q’est principall ad plede a issu du pays q’il est frank vers le dite count qe sra trie en le dite counte de Cornewaill quell triaille de son dit pier ferra fyne & declaracon de tout le clayme le dit count p^r Dieu & en oeuvre de charitee.”¹ *“To the very reverend Lord and Father in God the Archbishop of York, Chancellor of England.*

Beseecheth humbly John Tregoy, of the county of Cornwall, your poor servant and orator, That whereas the said suppliant and all his ancestors, from time whereof memory runneth not, have been freemen and of free condition, residing

¹ Tregoy v. Earl of Warwick, 1 Ch. Cal., p. 2. For the use of the French language in court proceedings, see this chapter, *post*, §§ 82–88.

in the said county of Cornwall; nevertheless Thomas Beauchamp, Earl of Warwick, by false information of the enemies of the said suppliant surmising the said suppliant to be his nief, appurtenant to his manor of Carnanton in the said county, took and imprisoned him out of the said county, and hath detained him in prison for a year and more. . . . May it please you to ordain such remedy to the said suppliant in discharge of his mainprize, and in salvation of his estate, according to your very sage discretion and rightful judgment; having regard that the father of the said suppliant, who is the principal, hath pleaded to issue of the country that he is free, against the said Earl, which will be tried in the said county of Cornwall: which trial of his said father will make an end and declaration of all the claim of the said Earl, for (the love of) God and in work of charity."

In the reign of Henry V. (1461-1483), one Margaret Toty presented her grievances to the chancellor in her English bill as follows:

"Unto the right reverent Fader in God, the Bisshop of Bathe & Chaunceller of Englund.

Lowely besecheth your good and g^acious lordship your pore bed-woman Margarete Toty, that whereas oon Edward Stalon etc."

Here follows statement of grievance, and then is added:

"And so your seid supplyaunt is withoute remedy, she beyng in so grete prov^rte as she is, withoute that youre gode and g^acious lordship unto her be shewed in that behalfe."

Then is added the prayer beginning as follows:

"Please your gode lordship the p^rmyssez tenderly considered to g^aunte a writte of Sub pena, etc."

The bill ending:

. . . "That ye theruppon may make a rule and a jugement as goode feyth and conscience will requyre, and she shall dayly pray for the p^rservacion and kepyng of your most p^rspons astate."¹

§ 64. Early bills in chancery — Continued.— The following is a typical illustration of these early petitions to the lord chancellor:

"To the right revend Fader in God and his right good & gracious Lord the Bisshop of Deram and Chaunceller of Englund.

¹ Toty v. Norton, 1 Ch. Cal. 84.

Mekely besechith yo^r good lordship yo^r poure orato^r Rauf John, of the citee of London, cobeler, that whereas yo^r said poure orato^r, for the sustentacōn of hym, his poure wif & children, made certain peyre of shoes," &c.

Here he further states, as a grievance, that, because of the making of said "peyre of shoes," he was arrested by the Warden of the Shoemakers Company and thrown into prison, and then adds his prayer, as follows:

"Wherefore please it youre gracious lordship, the p^rmisses remembred, to g^runte a *Corpus cum causa* directed to the maire and shirfes of the said cite of London, that yo^r said poure orato^r may be brought affore yo^r lordship, and the matter to be examined as right and consciens requireth, thus atte the reverens of God and in way of charyte; and he shall duryng his lyf pray to God for the p^rs^rvacon of yo^r full hono^rable lordship."¹

§ 65. Early bills in chancery — Continued.— The following is given as a fair sample of one of the earliest printed bills in English. This is not only interesting as an early bill in chancery, but also on account of showing the English of that period:

"To the Worchipfull Fader in God Bysshop of Bathe Chaunceller of Englond.

Besecheth mekely your pouer oratour Simon Saxby of Norwych, That howe nowe late he edified an hous in the paryssh of Seynt Swythyn in Norwich, alle redy unto the thachyng, ayoyning to a tenement of Piers Laurence w^yyn the sayd towne; the wheche Piers havyng evell wyll and dispite unto the said besecher, that he shulde bylde a better tenement then was hys said tenement, gadirde grete poeple in the maner of a ryot, apon the nyght dide caste downe the said hous unto the fynall destruccion of your said besecher, because heys a pouer man, and noght of power to reedifie the said hows: and the said Laurence ys the undirchyrreff, the wheche ys a grete office, and draweth to yt grete reule in the said citee; agaynes whom your said besecher mowe gete none execucion nor remédie of the cōe ley, and also for po^rte as ys aforesaid. It please your gracious Lordship to consider the p^rmissee, and

¹ Ralph John v. The Warden of the Shoemakers Company, 1 Ch. Cal. 94; Edw. IV., A. D. 1399-1412.

theruppon to graunt a wrytte direct unto the said Piers, charging hym to apere afore yow atte c^rtein day upon a c^rtein payn by yowe to be limite, to be examined apon the said p^rmisse, and to se that justice be done unto your said besecher, as lawe and conciens will, for the love of God and by way of charite."¹

A party in the time of Henry VI. (1422–1461), seeking redress in the court of chancery for a trespass committed upon one of his servants, presented the following bill to the master of the rolls:

"To my full honorable and right worshipfull maister my mayster the Clerke of the Rolls.

Sheweth and complayneth unto y^r goode maistership Piers Godard textwriter of London that where oon Wyll^am Rydmyngton serv^ante of Laurence Wylkynson vynter of London sithen the feste of Ester laste paste, come into the house of y^r seid besecher ayenst his love and his leve, and there ravysed and defoyld oon Johane Hunter serv^ante to yo^r said suppyant, in yo^r said besecher owne house iiij. dayes togedre, yo^r seid besecher and his wyf beyng sumtyme oute at masse and besy in other occupacions. Wherupon yo^r seid besecher, going to Grey Frerys to here masse, the seid Willm toke yo^r seid besecher by the sleve, and hym resoned of the premisses, and trespacys doon in his house. And yo^r seid besecher askid the seid Wyll^am if he wolde swere that he had not defoylid his serv^ant or noe; and he seide nay: And therew^t wolde have smetyn yo^r seid orat^r, whiche defendid hym as he cowde. And sithens the seid Wyll^am by untrue means hathe wrongfully vexid and troublid yo^r seid serv^ant, to his grete hurte and coste. Wherefor please it yo^r goode Maystership at the reverenc of God tenderly to consider the premissis, and therupon to set due correction; and that yo^r seid besechre may be recōpensid for the trespase aforsaid, and for the wrongfull vexation, as right, law, and consciens require, at the reverens of God and in way of charitee."²

¹Saxby v. Laurence, 1 Ch. Cal. 83; passes. As a sample of one of these temp. Henry VI., A. D. 1422–1461. see the petition of Roger Bakler

²Godard v. Ridmynton, 1 Ch. Cal. charging one John Bolton with having raped, robbed and murdered his wife Isabell. 5 Rot. Parl. 111.

There are several peculiar features about this bill, viz: First, it is addressed to the master of the rolls. Second, it is for a pure and simple trespass, without any allegation or showing in the bill that the complainant was without remedy at common law. Third, no statement of facts showing oppression or "power of the defendant," such as was usually made as an excuse for seeking relief in chancery. Fourth, no prayer for process or that the master of the rolls should in any manner bring the defendant before him.

The record is silent as to what disposition the "Mayster the Clerke of the Rolls" made of the case, but we may safely say that, if the evidence sustained the bill, the defendant got his just deserts.

§ 66. Early bills in chancery — Continued.— Complaints against violence of this character were not uncommon. One Gray, in the time of Henry VIII., A. D. 1509–1547, after describing himself as "your humble servant and tenant, Thomas Gray, late servant and tenant unto the full reverent fadre in God tharchebisshopp of Caunterbury, late deceased, ov^r whose soule God have m^rcie," grievously complains "ayeinst oone Shakerley a soudiour" (soldier) charging that he attempted to defoil the complainant's servant and cousin, where she was "mylking of kyne," that, upon her informing complainant of the fact, he "badde the seid damisell go mylk the beestes as she didde before," and that "he wolde wáyte on hir," that "anone as she was at hir seid besinesse cam the seid misdoer" to carry out his purpose, the "damisell made noyse," the master came to the rescue of his maid servant, the soldier threatened to slay the master, and, afterward, when "your seid besecher was besy at his hervest & half naked," the misdoer, with other soldiers, attacked him and "there bette & wounded yo^r seid besecher," and "lefte him there as for a dede man, w^h wounds in his heede, his arme nearly smyten in two, and his legge n^rly smyten asundre, and many hurtes & wounds in his body, handes, and face." The bill further alleges that, not content with this, the defendant and his fellows avowed "that they wolde come unto his hous and slee him utterly," that, for this, "your seid besecher was fayne, w^h all his woundes and hurtes, to fle his place;" and, further, that "he dare not go home ayein unto tyme a remedye be hadde by your good grace." The bill then con-

cludes with a prayer "that it please unto your full reverent faderhode and right gracious lordshipp tenderly and rightuuisly to considre th p^rmysses, and thereupon to provide and ordein by your high wisdomes such wey and remedie as your seid besecher may goo home ayein un to his seid place, and live and duelle there in peas and saufte of his lyfe as your serv^{ant} and ten^{ant}, and he shall pray God for you."¹

The reader may tire of these extracts from old forms, but he must remember that no amount of description can furnish to the mind of the real lawyer such a picture of the old court and its practice as is found and accurately presented in these old records. They, like the old, worn marble steps, leading up to the door of some ruined temple, show the paths where innumerable worshipers have trod before; besides, it must be remembered that, as remarked by Wallace, "no species of report can be so authoritative a memorial of what was done in court as the record itself. This is monumental evidence, and depends not on the faithfulness of memory or of conception, but merely on the accuracy of transcript."²

§ 67. *Simplicity of early bills.*—From the examples already given it may be seen that these early bills in chancery, like petitions to the king, are very simple in form. Story says: "In early times, as might well be supposed, bills were in their structure of great simplicity and brevity. The cases in which resort was then had to equity jurisdiction were comparatively few, and the facts were of no great complexity or difficulty of detail. The rights of parties depended upon titles exceedingly simple in their nature and origin. The wrongs to be redressed were palpable and direct. The whole business of human life flowed on in narrow and shallow channels; and it might be said, almost without a figure, that as the stream moved along with its slow and languid and winding current, it might be sounded and measured to its very depth and bottom by any common mind. The cause of every interruption in its progress was immediately visible; and the remedy to be applied was as clear as the ripple of the stream, which indicated it to the most careless eye."³

The proceedings, as we learn from the records which have

¹ Gray v. Shakerly, 1 Ch. Cal. 128. ² The Reporters, 467. ³ Story, Eq. Pl., § 11.

been printed by the record commissioners, were very analogous to those in the council. The plaintiff in his bill simply detailed the facts; it was not necessary that the bill should use any particular phraseology, or that it should define or describe the cause of suit in any set or definite terms, as in a declaration at law. All that the plaintiff had to show was that his was a case which ought to be entertained under the general powers delegated to the chancellor; in other words, that his was a case that would be entertained by the king and his council, in the absence of a court of chancery.¹

While this was all that was required of the plaintiff, yet, in the examples of these bills above given, and in others printed in the Chancery Calendars, we find six of the nine divisions or parts into which the modern bill in chancery is divided, viz: 1, the address; 2, the introduction; 3, the statement, or premises; 4, the jurisdiction clause; 5, the prayer for remedy; 6, the prayer for process. These will be noticed in their order as follows:

§ 68. *The address.*—Bills in chancery being simply petitions upon the part of the subject to the sovereign for the exercise of grace through his deputy—the chancellor,—like the petition to the king, began with an address, and, as was the bounden duty of the subject, his approach to the sovereign was cringing in form. As we have already shown, originally bills in chancery were petitions for grace addressed to the king, and by him turned over to his deputy, and that later the practice became universal of addressing bills direct to the lord chancellor, or the actual keeper of the great seal.

When there was neither lord chancellor nor lord keeper bills were addressed to the king, thus:

*“To the King’s most excellent Majesty, in his Highnesse Court of Chancerie.”*²

If the great seal is in the hands of lords commissioners then the bill must be addressed to them:³ That is, the bill must be addressed to the person or persons having the actual custody of the great seal at the time of its being filed. If the seals were in the queen’s own hands, then the bill was addressed.

¹ Spence, Eq. Jur., 367.

² Maddock, Ch. Pr. 205.

³ West, Symboleography, Pt. 2, fol. 194, sec. 68 and 211, sec. 87.

"To the Queen's most excellent Majesty, in her High Court of Chancery."¹ If there was a lord keeper, but no lord chancellor, then the address was as follows:

"To the right Honorable Sir John Puckering, Knight, Lord Keeper of the Great Seal of England."²

Where the lord chancellor or lord keeper was a party to the bill then the address was also to the queen.³ In such cases the final decree is: "*By the Queen's Most Excellent Majesty, in her High Court of Chancery,*" and is signed by her.⁴

These addresses direct to the king or queen, in the absence of the deputy, and the signing of the decree in the name of the sovereign, are in perfect consonance with the doctrine that the latter was the "fountain of justice," and were simply examples of falling back to the old forms used in petitions direct to the king before the practice was permitted of appealing direct to the lord chancellor.

The following examples of addresses to the king and addresses to the chancellor are given for comparison:

"*A tres-noble, tres-excellent, & tres-puissant Seignr nre Seignr le Roy & son bon conseil.*"⁵ — "To our most-noble, most-excellent, and most-powerful Lord, our Lord the King and his good Council."

"*A LEUR tres-excellent, ts-redoute, & ts soveyn Sr nre Sr le Roy & a son ts-sage Conseil, & c.*"⁶ — "To their most-excellent, most-invincible and most-sovereign Lord our Lord the King and to his most wise Council."

"*A T'S excellent, ts puissant, & ts gracious Sr nre ts redoute Sr le Roy & as ts sages Srs d'icest p'sent Parlement, monstrent ts humblement voz liges Maire, Alderman, & Comunalte de vre cites de Londres, q come, &c.*"⁷ "To the most excellent, most powerful and most gracious Lord our most invincible Lord the King, and to his most wise Lordships in the present parliament, sheweth most humbly your subjects the Mayor, Alder-

¹ West, Id., sec. 87; 1 Daniel, Ch. Pr. 357; Hunt v. White, 1 Chan. Cal. 147.

² West, loc. cit.

³ Daniel, loc. cit.

⁴ Daniel, loc. cit., citing Leg. Jud. in Ch. 254, 256, and other authorities.

⁵ 2 Rot. Parl. 892; Edw. III., A. D. 1326-1377.

⁶ 3 Rot. Parl. 69; Rich. II., A. D. 1379.

⁷ 3 Rot. Parl. 325; Rich. II., A. D.

1393-94.

man, and Commonalty of your City of London, that whereas, &c."

"*A ts revrent pier en Dieu lescevesq Deverwyk Chaunceller d'Engleterre; monstre Thomas Duc de Gloucestr; q come &c.*"¹

"To the very reverent Father in God the Archbishop of York, Chancellor of England; Sheweth Thomas Duke of Gloucester; That whereas, &c."

"*A MON ts hon^rable & ts g^racious S^r le Chaunceller Dengleterre, &c.*"² "To my most honorable and most gracious Lord Chancellor of England."

§ 69. *Introduction.*—The next step and the most natural one for the petitioner, after the address to the king, the king and his council, or to the chancellor, was to tell who he was and state his residence. This is still retained as one of the indispensable parts of a modern bill in chancery, and is very appropriately called the *Introduction*. It is needless to add that this *Introduction* was common to petitions to the king and the earliest bills in chancery, and couched in the same cringing tones of supplication, the most prominent ideas of which were the *humility*, *distress* and *poverty* of the applicant. A few illustrations are here given, selected for comparison, nearly all from petitions and bills in chancery dating back prior to the end of the fifteenth century.

From Petitions to the King.

"*Prie son humble & devout Chapellayn Evesqe de Bangor, qe come, &c.*"³ "Prays his humble and devoute Chaplain Bishop of Bangor, that whereas, &c."

"*Monstrent ses povres Oratours les Mestre & Escolers de son College appelez Mokol Universite Halle en Oxenford quele College estoit primement funduz p^r vre noble progenituor le Roi, Alford qi Dieux assoil, &c.*" . . . *q come, etc.*"⁴ Sheweth his poor orators the master and schollars of his College called Mokol University Hall in Oxford, which College was first founded by your noble progenitor King Alfred, upon whom God have mercy, . . . that whereas, etc."

¹ Gloucester v. Othale, 1 Ch. Cal. 1; Rich. II., A. D. 1377-1399.

² Rot. Parl. 392; Edw. III., A. D. 1326-1377.

³ Bief v. Dyer, 1 Ch. Cal. 11.

⁴ Rot. Parl. 69; Rich. II., A. D. 1379.

*"Suppliant humblement Olyv' Billyng de Wympeton en la Countee de Notyngham & Agnes sa feme, q fuist la feme de John Sewale de Wympeton, Qe come, &c."*¹ "Humbly besecheth Olive Billing of Wympeton, in the County of Nottingham, and Agnes, his wife, who was the wife of John Sewale of Wympeton, that whereas, &c."

"Mekely besecheth and pitously complayneth your poor Bedewomman Jahne Glyn, widowe, &c."²

From Bills in Chancery.

*"Supplie humblement vre poure orat' John Bief de Fouïlmre q come, &c."*³ "Humbly besecheth your poor orator John Bief of Foulner, that whereas, &c."

*"Supplie humblement vre chaplen & orator Robt. Burton clerk Chaunter de leglise Cathedrall de nre dame de Nicoll, q come Richard, nadgairs evesque de Nicoll, &c."*⁴ "Besecheth humbly your chaplain and orator Robert Burton, clerk, chanter of the Cathedral Church of our Lady of Lincoln, that whereas, Richard, late Bishop of Lincoln, &c."

"Lowly besecheyth' yo^r good and gracious lordship yo^r poor bedewoman Margarete Toty, that whereas, &c."⁵

§ 70. The stating or narrative part.—The third formal part of a petition to the king, or to the king and his council, and early bills in chancery, is called the *Stating* or *Narrative* part, because it was here that the party placed before the king or the king's deputy—the chancellor—the facts constituting his grievance; in other words, a statement of the applicant's cause of complaint. Those statements were necessarily as variant as the facts relied on as grievances, and therefore no comparison can be made between such statements found in petitions to the king and in bills presented to the chancellor, except to note that many technical expressions, common to both, are still familiar to every modern chancery lawyer. The following examples are given:

Statements, both in petitions to the king and in early bills

¹ 4 Rot. Parl. 80; Henry V., A. D. 1414.

² 6 Rot. Parl. 85–87.

³ Bief v. Dyer, 1 Ch. Cal. 11.

⁴ Burton v. Yerburch, 1 Ch. Cal. 25; Henry VI., 1422–1461.

⁵ Toty v. Norton, 1 Ch. Cal. 88; Edw. IV., A. D. 1461–1488. For other illustrations see examples of petitions and bills, *ante*, §§ 62, 63, 64, 65. For bedewoman, see *ante*, p. 108, note 3.

in chancery, almost invariably began with "*q come*," the old Norman-French, "That whereas." The following are given as examples: "*q come voz progenitors q Dieux assoile*,"¹ etc. "That whereas your progenitors upon whom God have mercy," etc. "*q come luy ts noble Roi Edward le tierce, q Dieu assoille*, etc."² "That whereas he, most noble King Edward III., upon whom God have mercy," etc.

§ 71. **Absence of other remedy.**—As the king had established courts for the administration of justice, and his subjects were expected to apply to them in all cases for redress of grievances where they were capable of affording a remedy, it was proper that the petition should state facts showing that the applicant was without other remedy, or at least without an adequate or complete remedy except that afforded through the exercise of the reserved judicial authority on the part of the king. Not only was it proper that the petition should present a state of facts requiring the exercise of the king's grace, but frequently the petitioner inserted what in modern bills is called the "jurisdictional clause;" that is, he averred that he was without remedy at common law. In connection with this averment the petitioner frequently gave a reason in support thereof, many of which sound odd enough to a modern chancery lawyer, examples of which are given below. As the bill in chancery was simply a petition to the king with the address direct to the king's deputy — the chancellor — and the jurisdiction was precisely that of the king, we find the same rule as to averment of jurisdictional fact, and the same averments as to the absence of remedy at common law. In both the petition to the king and bill in chancery the averment was useless unless the facts stated showed its truth. In other words, this averment is a mere conclusion of the pleader, and the king or chancellor might, and frequently did, come to a different conclusion. The king's responses, "*Sue a la cõe Lei*," sue at common law,³ or, as sometimes expressed in Latin, "*Ad cõem Legem*,"⁴ indorsed upon many petitions, show that redress was often denied solely on the ground that the party had a

¹ 8 Rot. Parl. 52; Rich. II., A. D. 1378.

² 2 Rot. Parl. 415.

³ Id. 418. See *ante*, § 47.

⁴ 8 Rot. Parl. 178; Rich. II., A. D. 1383-84.

remedy at common law. This jurisdictional averment therefore was and continues to be, although found in every modern bill in chancery, a useless one.¹

Sometimes the allegation of a bill was that the plaintiff was too poor to sue at common law. The following are examples, one in Norman-French and the others in old English.

*"Et les queux John & Katherine sont si povre & le dit John simalade qui'ils nount dount p'suir la cõe ley."*² "And the which John and Catherine are so poor and the said John so ill that they cannot pursue the common law."

"And your seid supplyaunt is withoute remedy, she beyng in so grete poverté as she is, withoute that youre gode and gracious lordship unto her be shewed in that behalfe."³

The great power or influence of the defendant being such as to prevent the plaintiff from obtaining justice at common law was frequently alleged as a ground for seeking the king for redress. Thus Aubyn de Clynton, complaining of a gross and outrageous trespass, says:

*"Et les queux Johan & Philipp se tindrent si haut, & taunt manacerent, qe le dit Abyn n'osent sai querele suyre a la comune Lei."*⁴ "And the said Johan & Phillip hold their heads so high and are so threatening that the said Aubyn does not dare contest with them at the common law."

§ 72. *Prayer for process.*—In some of the most ancient bills, as printed in the Chancery Calendars, the plaintiff did not pray for any process at all, but simply asked the chancellor to require the defendant to appear before him, or to examine the defendant; in others the prayer for process was varied as the facts of the case required,—sometimes a writ of *certiorari*, a writ of *habeas corpus cum causa*, sometimes a *subpœna*, and sometimes other writs.⁵ The first time we find a writ of *subpœna* prayed for by name is in the case of *Edward Lord Hasting v. Dacy*.⁶

Story says that the process of *subpœna* seems first to have been introduced into the court of chancery to compel an ap-

¹ Story, Eq. PL., § 34.

² *Belle v. Savage*, 1 Ch. Cal. 14.

³ *Toty v. Norton*, 1 Ch. Cal. 84, A. D. 1461-1483.

⁴ 1 Rot. Parl. 409, temp. A. D. 1321-2.

⁵ Story, Eq. PL., § 12; 1 Spence, Eq. Juris. 367.

⁶ See *post*, §§ 76, 80, for a full description of the method of bringing the defendant into court.

pearance to a suit in equity by Bishop Waltham, who was chancellor in the reign of Richard the Second. It was anciently and originally a process in the courts of common law, used to compel the attendance of witnesses under a penalty to appear and give testimony. This process was therefore taken up by the high court of chancery "because it was the nearest process that was used in case of attestation by the common law."¹

This statement is made by Story, citing Gilbert's *Forum Romanum*, but, by a typographical error, the word "*newest*" is substituted for "*nearest*."²

§ 73. *Prayer for remedy*.—The next part of a petition to the king or bill in chancery was the prayer for remedy. This prayer was almost universally general and frequently couched in the most humble, cringing and beseeching terms. Occasionally a party asked for such special relief as he deemed himself entitled to under the facts stated, but this was the exception to the rule. The prayer found in the early petitions to the king, as well as to bills in chancery, often terminated with the phrase "*& ceo pur Dieu*," "and this for (love of) God;" sometimes varied in different ways, for example, "*& ceo pur Dieu & en oeuvre de charitee*," "and this for the love of God and in the work of charity." Other forms are given below, all to the same effect.

The following is the termination of the prayer to the first printed bill in chancery: "*Et outre ceo de faire droit a dit suppliant solonc loy & reson demande p^r Dieu & en oeuvre de charite*."³

"And besides this to do right to said beseecher according to law and as reason demands for (love of) God and in work of charity." A literal translation of the old Norman-French, "*et ceo p^r Dieu & en oeuvre de charite*," would be, "and this for God and in work of charity," but the words "*the love of*" are understood, rendering it more properly, "and this for *the love of* God and in work of charity."⁴

The simplest form of this prayer for remedy consisted of

¹ Gilbert, *For. Rom.* 37.

³ 1 Ch. Cal. 2, temp. Richard II.,

² Story, *Eq. Pl.*, § 45. See also Bar-

A. D. 1377-1399.

ton, *Suit in Eq.* 7, 8, 61, and 8 Reeves, *Hist. of Law*, 192.

⁴ 1 Ch. Cal. 14, 15.

four Norman-French words, found at the end of the petition to the king, as follows: "*Dunt il prie remedie.*"¹ "Of which he prays remedy." This was sometimes varied as follows: "*Dunt il prie remedie pur Dieu.*"² "Of which he prays remedy for God." And again as follows: "*Dount il pri pour Dieu & pour oeuvre de charite g'ce & remedie.*"³ "Of which he prays for God and for work of charity, grace and remedy."

"The following is given as a fair sample of a general prayer to a bill in chancery during the reign of Richard II., A. D. 1307-1326.

"*q pleise a vre ts gracious Sre d'ordeigner tiel remedy en le dit caas come le dit caas requert pur Dieu & en oeuvre de charite.*"⁴

"Which may it please your most gracious lordship to ordain such remedy in the said case as the said case requires, for (love of) God and in work of charity."

§ 74. **Prayer for remedy—Continued.**—Occasionally this termination is found written partly in French and partly in English, as in the following hybrid example:

"And yat for ye love of God and in ye oeuvre of charite."⁵

The first printed English bill in chancery terminates with the stereotyped expression "for Goddes love and in the way of charite."⁶ From this time on we find this the usual termination of English bills. Precisely as petitions to the king and his parliament, when in English, usually ended "for the love of God and by way of charite," varied sometimes as follows:

"For Goddes luf and in werke of charitee."⁷

"*Dont la diste Isabelle prie a nre Seignr le Roy a sa grace, & remedie pur l' amour de Dieu.*"⁸ "Of which the said Isabel prays to our Lord the King grace and remedy for the love of God."

"*Dount la dist Alice prie a nre Siegnr le Roi & a son Consaile, pur Dieu, remedie & ayde.*"⁹ "Whereof the said Alice prays to our Lord the King and his Council for (love of) God, remedy and aid."

¹ 1 Rot. Parl. 390; Edw. II., A. D. 1321-22.

² Id. 390.

³ 1 Rot. Parl. 391; Edw. II., A. D. 1321, 1322.

⁴ Erdington v. Shirley, 1 Ch. Cal. 6.

⁵ 4 Rot. Parl. 307; 4 Henry VI., A. D. 1425.

⁶ 1 Ch. Cal. 19; Henry VI., A. D. 1422-1461.

⁷ 4 Rot. Parl. 386; Henry VI., A. D. 1430.

⁸ 1 Rot. Parl. 411; Edw. II., A. D. 1321-1322.

⁹ 1 Rot. Parl. 400; Edw. II., A. D. 1278-1325.

termination of the prayer, both in petitions to the king and in bills in chancery, varied by the substitution of "for the reverence of God," in place of "for the love of God." In petitions to the king, we find "And thys petition is made to the king, we find "And thys petition is made, and in weye of charitee."¹ This termination of bills in chancery is found quite often; for example, "atte ye revrence of God and in weye of charitee."²

Prayer for remedy — Continued.— Sometimes the petitions to the king as well as to bills in chancery, conclude with a conditional offer to pray for the person or party to whom they were addressed; thus in the reign of Henry VI., we find Richard Duk concluding his petition to the king with "*de il pour vous,*" "and he will pray to God for you." In the reign of Henry VI. we find another petitioner concluding his prayer with the same expression.³

A petitioner to King Henry VI. concludes his prayer following: "This for the love of God and for the wit of the poure liege peple, which for this meritt all hertly pray to God for you."⁴

Another example of this termination of a prayer to a bill in chancery during the same reign. The plaintiff, after the usual address, statement of grievance and prayer for subvention, "and heruppon right to be doon unto the same, which ever mor shal prai God for youre high grace." "at."

Other variations of this termination of the prayers in chancery are noted:

"aid pore orato's shall ever p'y to God for you' good

"reverence of God and by the wey of charitee, and our shall contennually pray God for yewe."⁵

"said orato's shall dayly p'y to God for the p'

¹ 67; Henry VI., A. D. 1436.
D. 1436.

² 36, 42, 58, 59, Henry VI., 192, 105, 115, 119, 119.

³ 168, 478.

⁴ 5 Rot. Parl. 109, 111.

⁵ Kymburley v. Goldsmith, 1 Ch. Cal. 20; Henry VI., 1422-1461. For beedman, see ante, p. 108, note 8.

⁶ 1 Ch. Cal. 41; A. D. 1422-1461.

⁷ 1 Ch. Cal. 108.

spouse contynuanee of your said lordeship in helthe & honour." ¹

"And the said John Hunt accordinge to his bounden dutie shall daily praie unto God for yo^r ma^{ties} long & prosperous raigne over us yo^r heighnes subjects." ²

From the time of Henry VI., the practice of thus terminating a bill in chancery became more common until the reign of Elizabeth, when it became the usual termination of almost every bill. The first time we find this expression abbreviated to, "and your said orator shall pray, &c." is in the case of *Atkinson v. Harmon*.³

We have thus traced to its source the now meaningless termination of modern bills in chancery,—“and as in duty bound your orator will ever pray, etc.”

Sometimes, but rarely, petitions to the king, instead of concluding with a general prayer, samples of which are given above, contained a special prayer for such relief as the petitioner believed himself entitled to. The following examples are given—one taken from a petition in the time of Edward II. and the other from that of Edward III.:

“Dont le dit Katherine prie pur Dieu qe ele poet avoir son dower les ditz tenementz qe son Baron vendi selon reson & Lei de la terre.” ⁴ “Of which the said Katherine prays for (love of) God that she may have dower of the said tenements that her husband sold according to reason and the law of the land.”

“Q’il pleise a sa g’cious & haute Mageste lui g’ter confirmation de la chartre susdite, en hon’de Dieu, & en oeuvre de charite.” ⁵ “May it please his gracious and high Majesty to grant confirmation of the charter aforesaid, in honor of God and in work of charity.”

These six divisions or parts of a bill in chancery, viz., the Address, Introduction, Statement or Premises, Jurisdictional Clause, Prayer for Process and Prayer for Remedy, constituted all of the divisions or parts of the original bill in chancery, all of which, except the prayer for process, were common to both petitions to the king and bills in chancery. We have

¹ 1 Ch. Cal. 133; Edw. VI., A. D. 1547-1553.

² *Hunt v. White*, 1 Ch. Cal. 147.

³ 1 Ch. Cal. 142, temp. 1553-1558.

⁴ 1 Rot. Parl. 423; Edw. II., A. D. 1424-25.

⁵ 2 Rot. Parl. 393; Edw. III., A. D. 1327-1377.

attempted to show when the prayer for process originated, but, whether correct or not, these six divisions or parts "constituted the whole of the bill, and continued to do so until a comparatively modern period of time, although it is difficult to fix the exact time, when additions began to be made to it." These additions consist of the Confederating Part, Charging Part, and the Interrogating Part, and, together with the first six named, constitute the nine parts or divisions of the modern bill in chancery. As said by Judge Story: "These additions must indeed have been gradually incorporated into it, as the progressive increase and complication of the common business of life or the new exigencies of society, created an occasion or necessity for them."¹

XI. BRINGING THE DEFENDANT INTO COURT.

§ 76. Bringing the defendant into court — Reading the bill.— Formerly the chancellor, either personally, or perhaps by a master, examined every bill presented to him to see whether or not the defendant should be called into his presence at all.² At first no written answer was required, but the defendant was at once brought before the chancellor and there put upon his defense "straightway *viva voce*."³ This practice of reading the bill before making any order was evidently but a continuation of the practice followed when the bill or petition was direct to the king in person. After these petitions had ceased to be addressed to the king, but instead were addressed to the chancellor, the latter continued the practice of reading the bill and granting or refusing an order at the threshold, as justice might require. This ancient practice accounts for the fact that the prayer of the bill began: "In tender consideration of the premises, etc." When the granting of process was not a matter of course, but the bill was carefully read and it appeared that it contained equity upon its face, the defendant was called before the chancellor in person to make his defense, and even after the adoption of the writ of *subpœna* as a means of procuring the appearance of the defendant, this cringing form of supplication had a meaning, for then the whole thing was a "matter of grace."

¹ Eq. PL, § 12.

² Kerly, Hist. Eq. Juris., p. 66.

³ Kerly, *loc. cit.*

While anciently the court perused the bill itself, to see whether the petition was proper before it was filed, yet later the court, by reason of the increase and multiplicity of business, left the perusal of the bill to the honor of the bar.¹ It is said that the chancellor sometimes took the advice of some of the other judges as to whether or not a subpoena should be granted upon the petition presented.² Lord Campbell says, in speaking of the beginning of the term of Sir Thomas More as lord chancellor: "The new chancellor began by an order that 'no subpoena should issue till a bill had been filed, signed by the attorney; and, he himself having perused it, had granted a fiat for the commencement of the suit.'"³ It will be noted that this order embodied four steps necessary to be taken before the issuing of the subpoena:

1. A bill signed by counsel.
2. Filing of the bill.
3. Perusing the bill by the chancellor.
4. The fiat (order) directing issue of process.

Doubtless some of these requirements had long prior to this order been practiced, and that the chancellor, in enumerating the several steps required, brought them together in one order.⁴

Lord Eldon said that the signature of counsel was required to the bill as a guaranty that "there appeared to him at the time of framing it good ground of suit;"⁵ while Spence says that it was besides a security against the introduction of scandalous and irrelevant matter with which the parties were too apt to defile the records when left to themselves.⁶

Of Sir Thomas More it is recorded that: "He tooke great paines to heare causes at home, as is sayd, arbitrating matters for both the parties good; and lastly he tooke order with all the attorneys of his courte, that there should no *sub pœnas* goe

¹ Gilbert, *Forum Romanum*, 91; Kerly, *Eq. Juris* 66; 1 Spence, *Eq. Juris* 868; Barton, *Suit in Eq.*, p. 43, note.

² Hargrave's *Law Tracts*, 832; Spence, *loc. cit.*

³ 2 *Lives of Ld. Chs.*, p. 37; Roper's *Life, Barrington*, p. 308, notes. This last authority cited in 1 Spence, *Eq. Juris*, p. 868, note.

⁴ It is said that this lord chancellor was the first to introduce the practice of requiring the bill to be signed by counsel. 2 Maddock, *Ch. Pr.* 206, 207; Hargrave's *Law Tracts*, 802; 1 Spence, *Eq. Juris* 868.

⁵ 2 Maddock, *loc. cit.*

⁶ 1 Spence, *loc. cit.*

out, whereof in generall he should not haue notice of the matter, with one of their hands vnto the Bill; and if it did beare a sufficient cause of complaint, then would he set his hand to it, to haue it goe forward; if not, he would vtterly quash it, and denye a *sub pœna*.”¹

§ 77. *Reading the bill — Continued.*— Although the modern chancellor and common-law judges are placed precisely upon the same footing, that is, neither can grant relief except the suitor brings his case within well-known and well-settled principles of law, and such suitor, so bringing his cause, has a right to demand of each the relief provided, yet, in *form*, the old theory that relief in chancery is a matter of *grace*, is to-day “standing over” upon the face of every bill filed. In the beginning of every such bill, or petition, the suitor, “humbly complaining, sheweth to your honor,” etc., while in the conclusion he *prays* for the relief desired, *prays* for process, *prays* for “such other and further relief as in equity and good conscience he may be entitled,” and finishes with the now unmeaning promise that “as in duty bound he will ever pray, etc.” All this is but a preservation in form of what was once a very fact, that is, that relief in equity was a matter to be humbly asked for by the subject, and graciously conceded by the sovereign. In the olden time, the suitor in the court of chancery was not only required to come before the chancellor with “clean hands,” but the palms of both were required to be turned up in supplication to the king’s deputy to whom the petition was addressed. Although process now issues as a matter of course upon the filing of every bill, yet, in theory, the chancellor still examines every bill of complaint and directs the issue of process. To fully appreciate this, one has only to examine some of the earliest bills of chancery extant of Edward the Fourth, say in the reign of Henry the Sixth, 1422–1461. For example, here is the beginning and conclusion of a bill of complaint addressed “*To the right reverend Fader in God the Bisshop of Bathe and Welles, Chaunceller of England:*

Besecheth mekely yo^r good and g^acious lordship yo^r pore orato^r John George, etc. . . .

¹ Hoddeston’s *Hist. of Sir Thomas More*, cap. 9, p. 53, quoted in *Parke’s Hist. Chan.*, p. 65.

Wherefor please it yo^r g^racious lordship, the premisses tenderly considered, to graunt a certiorari to be direct to the seid shiriffs to bring up the matter afore the king in his Cháuncerie at a certayn day by your lordship to be lymyed, therein to doo therein as right and conscience shall requir: this for the love of God and in wey of charitie, and yo^r seid orato^r shall ever prey to God for you.”¹

By Rule 12 of United States Equity Rules it is provided that “whenever a bill is filed, the clerk shall issue the process of subpoena thereon, as of course, upon application of the plaintiff;” yet a prayer for process of subpoena is still required, for Rule 22 provides that this prayer for “process of subpoena shall contain the names of all the defendants named in the introductory part of the bill.” This “process of subpoena” is no longer a matter of grace under the rule, but a matter of right, and prayer for process, though no longer an humble supplication for a matter of grace, still keeps its place in the bill as evidencing the plaintiff’s desire that process be issued; in other words, it performs the same office that a præcipe does in the beginning of a suit at law. Michigan Chancery Rule 1 provides that “*the prayer for process heretofore common in a bill of complaint may be omitted*, and the complainant shall be entitled to the process of subpoena on the filing of the bill of complaint.”²

In Illinois and in some other states, also, it is provided by statute that, upon filing the bill, a summons shall be issued at once, yet so natural is it to follow the old beaten path, that we still frequently find bills praying the chancellor “in tender consideration of the premises to grant his most gracious writ of summons,” and concluding, “and as in duty bound your orator will ever pray, etc.,” thus men hold on to the dry bone long after both meat and marrow are gone.

§ 78. *The subpoena.*—It was generally said of John de Waltham, master of the rolls under Lord Chancellor Courtenay, that he was the inventor of the writ of subpoena, but this is not correct, and owes its origin to the fact that in reality he first framed it in its present form, when a clerk in chancery, about the end of the reign of Edward III. (1377);

¹ Proc. Ch., vol. 1, p. 83.

² Michigan Rev. Rules of Practice, p. 101.

the invention consisting in the addition to the old clause *Quibusdam certis causis*, the words, "*Et hoc subpoena centum librarum nullatenus omittas.*"¹ The earliest printed bill in chancery is the case of Thomas, Duke of Gloucester, v. Thomas Othale, presented to the chancellor sometime between 1392 and 1396, prays for a writ of subpoena, not by name, it is true, but as a fact. The bill is in French, and a translation of the prayer is as follows: "Wherefore may it please your sage discretion to consider the matter aforesaid, and to grant a writ directed to the said Thomas Othale, for to be before you in the Chancery of our said Lord the King at the Octaves of the Trinity next coming, *under* the penalty of 100*l.*, to answer the matters aforesaid done in contempt of our said Lord the King."² The next case where this writ is prayed asks that the defendant be required to appear before the chancellor under a good penalty (*bone peyne*), etc.³ In subsequent cases (Henry V.) the chancellor is requested "to grant a writ under a certain pain by you to be limited, etc."⁴ But it was not until the beginning of the reign of Henry VI. that we find parties in their bills praying for a writ of subpoena by name.—"And ther up on of youre benigne and especial grace graciously graunte to the seid suppliant a writ *sub pena* direct to the seid Thomas, to apere before . . . Chauncellarie, at a certeyn day by yowe graciously lymetid, upon a grete peyne levable to the use of oure soverayn Lord the Kyng, etc."⁵

This penalty clause we find given by Barton as late as 1776 as follows: "And this you may in no wise omit under a penalty of one hundred pounds."⁶ At the time of framing this writ, it, as well as all other process, was in Latin, and this part of the writ—*under a penalty*—was expressed by the word *Sub pœna*, and this gave rise to the name of the writ.⁷ These subpoenas were directed to the defendant. The reader who has the curiosity will find one set out *in hæc verba* in West's Symboleography, Pt. 2, fol. 183, sec. 20. It has in it "*Quibusdam certis de causis corā in cancell,*" etc., and "*Et hoc subpoena centum librarum nullatena omittas.*" In the ancient form of the

¹ Campbell, *Lives of Ld. Ch.*, vol. 1, p. 283 and authorities there cited.

² 1 Cal. in Ch., p. 1.

³ Id., p. 11.

⁴ Id., p. 15.

⁵ Edward Lord Hastings v. Thomas Dacy, Id., p. 19.

⁶ Suit in Eq. 65.

⁷ Id.; Spence, *Eq. Juris*, vol. 1, 369; Barton, *loc. cit.*, note.

writ of subpoena the defendant was commanded to "appear before us, in our said chancery, on the — day of — next, *wheresoever it shall then be*, etc." This form was long continued after the court ceased to "follow the king" and became stationary at Westminster.¹

§ 79. **The subpoena — Continued.**— This innovation upon the part of the court of chancery of compelling the appearance of the defendant by writ of subpoena met with bitter opposition upon the part of the people, and so frequently were assaults committed upon parties attempting to serve the writs, that the courts found it necessary to provide, by rules, severe punishments for such contempt of its process.² Anciently the subpoena was served "by private parties and not by public officers,"³ unless the court, for good reason shown, provided otherwise. In an early case, during the reign of Henry VI., the bill prays for the sheriff to serve the writ on the defendants, the plaintiff not daring to do so. The prayer of this bill, in quaint old English, first calls for "writtes subpoena" directed to the defendants, and then asks the chancellor to "g^runte a wrytte directe to the shreve under a peyne to deliver these seide writtez subpena to the seyde William Hertelyngton and William Wyndesore for the seyde suppleauntz dar nout deliver to them the seide writtes, for the love of God and in the weye of charite."⁴ The antipathy to this writ had not subsided in the time of Queen Elizabeth, the register's books being full of complaints of outrages committed upon the servers; it was well, it would appear, if they escaped without broken bones; one man complains of having been made *to eat the subpoena*.⁵ In another case the writ was delivered to the defendant in the presence of the mayor of Leycester, whereupon "in the presens of the said maire and many other worthy men of the town, he cast it down despitefully in the street, saying openly he would not receyve nor obey hit."⁶ At times the supreme contempt of these sturdy old Britons for the court and its process found expression in language too vulgar to admit of transcription to the pages of a modern law book.⁷

¹ Barton, *Suit in Eq.* (1776), p. 64.

⁵ 1 Spence, *Eq. Juris* 869, 870, note.

² 1 Har. Ch. Pr. 164; Gilbert, *Forum Romanum*, 48.

⁶ 1 Chan. Cal. 24, temp. Edward IV.

³ Gilbert, *loc. cit.*

⁷ *Witham v. Witham*, 3 Ch. Rep. 41.

⁴ 1 Ch. Cal. 48.

§ 80. **Letters missive.**— In case the defendant be a peer or lord of parliament, or other “person of honor,” the prayer for process was that a *Letter Missive* be directed to the said defendant desiring him to appear and answer, etc., or, in default thereof, his majesty’s most gracious writ of subpoena, etc.¹ In such a case a subpoena was not issued in the first instance, but a letter directed to the defendant by the lord chancellor, or lord keeper, advising of the pendency of the action, and praying him to make answer thereto. These “Letters Missive,” as they were styled, first appear in the time of Elizabeth, and the bill in such case, instead of praying for a writ of subpoena, asked the chancellor to direct his letter to the defendant.² This right of peers to be first served by letter missive is very ancient.³ Maddock says that he had not been able to discover when the term “letter missive” was first adopted in chancery proceedings, and mentions the fact that it is used by Shakspeare in Antony and Cleopatra, and also in Macbeth.⁴ Spence says they first appear in the time of Queen Elizabeth.⁵ Barton says that Lord Bacon, chancellor, appears to have been the first who adopted this polite method of acquainting such defendants with proceedings which had been instituted against them.⁶

The following letter missive from Lord Chancellor Ellesmere to the Earl of Shrewsbury gives the form used in the time of James I.:

“Lord Ellesmere to the Earl of Shreswbury:—

“After my verie hartie comendacions unto yo^r Lo^p. Whereas

¹ Barton, Suit in Eq., p. 42, note; 1 Har. Ch. Pr. 158.

² Spence, Eq. Juris., vol. 1, p. 368; Barton, Suit in Eq. 68.

³ 2 Maddock, Ch. Pr. 242; Lord Milsington v. Earl of Portmore, 1 Ves. & B. 421.

⁴ *Loc. cit.*

⁵ 1 Eq. Juris. 368.

⁶ Barton, *loc cit.*

Such “letter missive” was directed to the “Right Honorable, etc.,” and began “May it please your Lordship. After my very hearty commenda-
tions to your Lordship: Whereas

etc. (here follows a notice of the pendency of the suit and a request that the defendant make his answer), and then concludes: “I leave your Lordship to the most merciful keeping of the Almightye.

From Saint A. the 9. of May, 1564.

Your very loving friend,

JOHN PUCKERING.”

For full form of this ancient document see West, Symbolographie, Pt. 2, fol. 183, sec. 10. For a later form (July 1, 1794), see Barton, Suit in Eq., p. 70.

the cause dependinge in the Chancery wherein Humfrey Briggs, Esq^r is pl. and yo^r L^{pp} def^t, is sett downe to be heard in Courte on Thursday, the 9th day of November next, I am att the pl^{ts} instance to give yo^r L^{pp} notice thereof by this my l^r, according to the manner used toward suche persons of honor; praying and requyring yo^r Lo^p hereby to take knowledge thereof, and to give order unto those whom you employe in such yo^r causes to attende the hearing of judgement in the sayd cause accordingly; whereof hoping there shall be no default on your Lo^{pp}'s parte, I bidd yo^r Lo^{pp} verie hartely farewell.

“Y^r Lo^p's assured friend,

“T. Ellesmere, Canc.

“Att York House, July 16, 1609.

“To the right Ho my good Lorde the Earle of Shrewsbury.”¹

The letter missive was no *process* of the court, but was a mere *de gratia* or complimentary notice, which the defendant might attend to or not at his pleasure. If he appeared, it was well, but if not, a *subpœna* issued against him, as in common cases.²

XII. THE ANSWER.

§ 81. The answer — Its origin and form.— There is no record preserved of anything like a written answer to a petition to the king, but the practice, probably, was to require the defendant to appear in person and make his defense, if any he had. At first the practice in the court of chancery followed the same course as when the petition was addressed to the king and his council. The defendant was subpœnaed to appear before the chancellor and, upon his appearance in obedience to such subpœna, he was generally examined *viva voce*, and, after arriving at the facts, in a summary way, by examination of the defendant, the chancellor made his order which was indorsed on the back of the bill in Latin. Lord Campbell says that this practice continued down to the latter part of the fifteenth century, when defendants began the practice of putting in written answers, “commencing with a protestation against the truth or sufficiency of the matters contained in the bill,

¹ 2 Camp. Ld. Cha. 406, 407, note.

² Barton, p. 71.

stating the facts relied upon by the defendant, and concluding with a prayer that he may be dismissed with his costs."¹

As the practice of making answer in writing originated in the court of chancery, the most natural thing in the world, the chancellors being all churchmen and versed in the civil law, was to look to that law for its form. Gilbert says: "The answer begins in the form of the civil law, viz.: *Sub protestatione de nimia generalitate, ineptitudine, obscuritate, nullitate, et indebita specificatione dicti libelli.*"²

After the practice of filing written answers was adopted, special replications, rejoinders and sur-rejoinders were permitted, for the purpose of introducing new facts. This course continued in use down to the reign of Queen Elizabeth, when it became unnecessary, upon the introduction of the more modern practice of permitting amendments to the bill and answer.³ Thus, if the defendant introduce new matter by way of defense, the plaintiff was permitted to meet it by an amendment of his bill, stating any facts which showed that the defendant's answer in fact constituted no defense. Then the case stood as if the plaintiff had, at the time of filing his bill, anticipated such defense, and framed his bill accordingly. Many expressions found in these ancient pleadings are still familiar to the chancery lawyers of to-day. For example, in the first printed bill in chancery we find the words "*et ensi soit,*" "and now so it is;"⁴ or as it appears in another bill, "*et ore soit ensy ts gracious Sr q un Piers Savage, &c.*"⁵ "And now so it is most gracious lord that one Piers Savage, &c."

A defendant, in his answer to one of these early bills in chancery, concludes as follows: "All whiche matters the seid Thomas is redy to p^{re} as this co^{rt} will award, & p^{re}ieth to be dismyssed with his resonable costes."⁶

Another defendant, to make the matter more emphatic, adds to this part of his answer the customary conclusion of a bill in chancery, viz: "for the love of Almyty God and in way of charyte."⁷

¹ Campbell, *Ld. Cha.*, vol. 1, p. 878; Spence, *Eq. Juris* 372.

² Protesting the said libel for being too general, absurd, obscure, vague, and unduly set forth. Gilbert, *Forum Romanum*, 90.

³ Campbell, *loc. cit.*

⁴ 1 Ch. Cal. 1, A. D. 1392-96.

⁵ *Belle v. Savage*, 1 Ch. Cal. 14, Henry V.

⁶ 1 Ch. Cal. 96, 98.

⁷ *Id.*, 100; Edw. IV.

Another defendant, in his answer to one of these early bills, sets up "That as for gret part of the matters conteyned in the seid byll, they ben determinable after the cours of the comyn lawes of this londe."¹

XIII. THE LANGUAGE OF THE COURT.

§ 82. Use of the French language in chancery pleadings, reports and text-books.—A proper understanding of the introduction and use of the French language in the pleadings and practice in the English court of chancery requires a general examination of the introduction and use of that tongue among the English people, and especially in their legislative and judicial tribunals. Surely the curious spectacle of a people discarding their native tongue and adopting that of a foreign race in the administration of justice and in the making of laws, and still retaining hundreds and possibly thousands of these foreign words and phrases, not only in their books but in their every-day speech, is a problem worthy of our careful consideration. Of course every student knows that, in a general way, this result was brought about by the Norman conquest, but the relation of the one to the other, as cause and effect, is not so well understood. Indeed, there is a general misconception upon this subject which it is well here to correct.

The account of the early use of the French language in the pleadings is given by Sir William Dugdale, as follows: "These were first introduced here by King William the First, who, having made a full conquest of this realm, for the better establishing thereof, thought it good policy utterly to abolish the English language, and instead thereof plant the French; and therefore ordained that not only the pleadings in courts should be in that tongue, but that all the children put to school should first learn French and then Latin. But Fortescue addeth another reason for the above, viz: that the French becoming by that conquest masters here might not be deceived in the amount of their revenues."²

¹ Answer in *Lord Berkely v. Margaret, Countess of Shrewsbury*, 1 Ch. Cal. 77.

² Orig. Jurid. (3d ed.), 95, quoted by Marsh, *Hist. of Courts of Equity*, pp. 84, 85.

This statement of the manner in which the French language came into general use in the legislative halls and the courts of England is in accordance with the generally received opinion upon the subject; notwithstanding this, however, it is probably erroneous.

Freeman, in his "History of the Norman Conquest,"¹ says: "Of all the dreams which have affected the history of the times on which we are engaged, none has led to more error than the notion that William the Conqueror set to work with a fixed purpose to root out the use of the English tongue."

§ 83. **Statement of problem.**—A curious problem presents itself to the thoughtful student. We have the singular spectacle of three separate and distinct languages all in use at the same time, among the same people—Latin, the tongue of learning; French, that of pleading in the courts and of official business generally, as well as the medium of polite intercourse; and, lastly, English, the language in daily use among the masses, especially the uncultivated. It was easy to account for the use of Latin as the language of learning. A knowledge of this language was the key with which its possessor unlocked the storehouses of antiquity, and, as a dead language and therefore unchangeable in character, it was deemed the only one suitable for the purpose of handing down the learning of the present to future generations. The use of the English tongue required no explanation, but there was a problem not so easy of solution. In a country where the great mass of the people spoke the English tongue, "French still was, or lately had been, the speech of official documents and of polite intercourse. Men sought to find a cause for a state of things, which seemed so strange, and they could think of no cause except a deliberate policy on the part of a conqueror whose own speech was French. The case is one of the many in which popular belief is so easily led to give to a single man the credit of changes which were really due to the gradual working of general causes. The long use of French in England as a polite and official tongue, the large French infusion which has made its way into our language, are among the fruits of William's conquest. . . . No legislative measure was ever passed against the

¹Vol. 5, p. 339.

use of the English tongue. The changes which did take place were the natural and silent result of circumstances, nor were those changes by any means sudden or immediate results of the conquest."¹

§ 84. **Natural causes for the change.**—These "natural" or "silent" causes, the action of which secured for the French tongue such foothold in polite literature, courtly intercourse, and in official documents not written in Latin, may be briefly stated as follows: The English crown was transferred to a French-speaking king, and partition of the highest offices and the greatest estates in England was made, among his French-speaking followers. The latter, namely, French-speaking earls, bishops, knights, clerks and citizens, spread themselves over every corner of the land, and took their place instead of or along side of Englishmen in every station in life, in every rank above that of villain. For this reason crowds of Englishmen found it at once necessary to learn to speak the tongue of their conquerors, and crowds of the French-speaking conquerors found it expedient to learn English. The several causes which led to the spread of the French language, and to the displacement of the English, may be summarized as follows:

1st. The mass of those concerned in the making of the law and its enforcement, in other words the ruling class, spoke the French tongue. This use by them of their native tongue was prompted by pride, convenience and necessity; they could speak no other. These officials, for these reasons, made their laws and promulgated their ordinances in their own tongue and also introduced it in the pleadings of the courts, the judges understanding and speaking it better than they did the English. The people who were expected to obey them and who were concerned in their administration found it expedient to learn the French.

2d. The people, brought into daily contact with their foreign rulers and their tongue, both written and spoken, found it a great convenience to be able to speak their language.

3d. The French was the court language—the king, the queen, the lords and ladies of the court spoke it, it being fash-

¹ Id., 5, 340.

ionable and stylish,—the society speech. Those of the upper walks of life, though of English birth, were eager for that reason to learn it. The same remark applies to those in the middle class, always ready to ape the manners and customs of those above them, just as those in the lower walks of life imitated those above them.

§ 85. **Result of these causes.**—As a result of these several causes the French tongue, introduced into England in 1066 by the Conqueror and his followers, gradually came more and more into use until the 13th century, when it reached the height of its influence. All through this century, when everything else was becoming more and more English, the French language was increasing its hold. A greater proportion of the people than ever before were able to speak it, and a greater number than ever before, though not able to speak it, could understand it when spoken. All acts of parliament, all pleadings in courts, all ordinances and other official documents promulgated by the king, or the king's council, were in the French language. This language was the one best understood by the mass of those who had a hand in public affairs. It was everywhere the medium of communication among educated people as well as the fashionable speech of polite intercourse. The children of the gentry were taught French from their childhood. They heard it spoken in their homes, and in this manner it became, in a sense, their mother tongue. Even the servants brought with these foreign nobles spoke the language of their masters and imparted it to the English servants with whom they associated, and to others of their station with whom they came in contact. The latter soon found that even a smattering of French was one of the means of preferment, and thus was added another incentive to the acquisition of the stranger language of the foreigners. Because of this general use of the French language the inconvenience of its use in public documents was not as great as one would at first blush suppose. The English lawyer of the 13th century, who spoke and wrote both English and French, heard the complaint of his English-speaking client and then embodied it in an appropriate French petition to the court for relief, just as a Chicago lawyer of to-day, who speaks German, listens to the grievances of his German client, and then sets them out in appropri-

ate English. In regard to the promulgation of the law the inconvenience was still less. But a very small per cent. of the population of a country ever becomes familiar with the actual text of its written laws. The great mass of the people in every country, who are called on to obey the law, only know it by hearsay. That the acts of parliament, therefore, were written in French was no real grievance, especially to a people who never complained at their being written in Latin.

§ 86. **Protest of the English people.**— But from what has been said it must not be understood that during all these years of gradual adoption and final substitution of the foreign tongue that the result was brought about without protest upon the part of the masses of the English-speaking people. The bitter struggle between the latter and the descendants of the foreigners and others, who desired to perpetuate the domination of the French tongue, culminated in the legal triumph of those who stood for the mother tongue, who, by the passage of a statute in 36 Edward III. (1362), directed that pleadings should be in English. This was, as has been observed, another step in civilization by the substitution, in equity proceedings, of the “vernacular language for a foreign one in its pleadings, which was early distinctively known as those by English bill.” I quote the preamble of this statute as furnishing the strongest reason for the change:

“Item, because it is often showed to the king by the prelates, dukes, earles, barons and all the commonality, of the great mischiefs which have happened to divers of the realm because the laws, customs, and statutes of this realm be not commonly holden and kept in the same realm, and for that they be pleaded, shewed, and judged in the French tongue, which is much unknown in the said realm, so that the people which do implead or be impleaded in the king’s court and in the courts of others have no knowledge nor understanding of that which is said for them or against them by their sergeants and other pleaders, and that reasonably the said laws and customs the rather shall be perceived and known, and better understood in the tongue used in the said realm, and by so much every man of the said realm may the better govern himself without offending the law, and the better keep, save, and defend his heritage and possessions, and in divers regions and

countries where the king, the nobles, and other of the said realm have been, good governance and full right is done to every person, because that their laws and customs be learned and used in the tongue of the country."¹

§ 87. *Use of French in the courts.*— Yet, notwithstanding this statute, bills in equity, it seems, were constantly in French, as the first printed bill in English is found in the Chancery Calendars, temp. Henry V., and was presented to the court somewhere between 1413 and 1417. In other words, at least fifty years after the passage of the bill referred to.²

The printed calendars, beginning about 17 Richard II. (1394), do not contain a single specimen of a bill in English until we get down to the beginning of the succeeding reign — Henry V. All the other bills during this reign are in French, but in the succeeding reign of Henry VI. we find but three bills in French, the last being in the case of *Burton v. Gerburgh*.³ From this time on the printed calendars furnish us only with English bills. The decrees and writs, however, were in Latin down to the reign of Henry VII.⁴

During the time of Lord Ellesmere, proceedings in the court were designated "by English bill," though, as he here were still some bills in French down as late as Henry V. (1442).⁵

In the form of a "letter missive," given by Barton, whose edition was published in 1776, we find the bill designated as "an English bill."⁶

Mr. Campbell says that although after the passage of the statute the French language no longer enjoyed any legal sanction, it had such a hold of legal practitioners that it continued to be voluntarily used by them down to the middle of the sixteenth century. Their reports, and treatises, and abridgments, were in French, and if we would find anything in Chief Justice Littleton's Digest, composed in the reign of George II., under the titles, "Tithes," or "Husband and Wife," we should find them under the titles, "Chemin," "Dismes," and "Baron and

Edward III., c. 15; 30 Law

¹ 1 Camb. Ld. Cha. 878.

Browning, 1 Ch. Cal. 18.
25.

² 1 Spence, Eq. Juris. 367, citing

Lord Ellesmere, Treatise, p. 45.

³ Suit in Eq. 70.

Femme.”¹ “The law, having spoken French in her infancy, had great difficulty in changing her dialect. It is curious that acts of parliament long continued to be framed in French, and that French is still employed by the different branches of the legislature in their intercourse with each other.”²

While this statute of Edward III. provided that all pleas should be “pleaded, shewed, defended, answered, debated, and judged, in the English tongue,” “the lawyers, always on the alert, appended a *proviso* that they should be ‘entered and enrolled, in Latin, and the old customary terms and forms retained. The people were therefore little the wiser, and but in a slight degree emancipated by this statute: indeed the only difference was, that whereas formerly they could not see the legal fetters which bound them, they now saw them without being able to free themselves! The Reporters still continued their notes in the law French, with the additional obscurity of the gothic black letter. Coke, ever the apologist of his brethren, gives a curious and sentimental reason, in his Reports, volume III, why the reports and statutes were preserved in the foreign jargon by Edward III., viz.: lest by the publication of them in the vulgar tongue, the unlearned might be subject to errors, and trusting to their own conceits endanger themselves.”³

§ 88. **Final triumph of the English.**—The proposal to adopt the English language, like all other proposed radical changes in the existing order of things, met violent opposition, especially on the part of those engaged or concerned with the administration of justice. Lord Campbell gives us a faithful picture of this hostility, as follows: “The proposition for conducting all law proceedings in English was most strenuously opposed, and seemed to many a more dangerous innovation than the abolition of the House of Lords or the legal office. Whitelock, in introducing it, was obliged to fortify himself with the example of Moses and a host of other legislators who had expounded their laws in the vernacular tongue. The reporters, who delighted in the Norman-French, were particu-

¹ 1 Lives of Ld. Cha. 241.

³ Parkes, Hist. Chan., pp. 43, 44.

² Id., note, where will also be found illustrations of the language so used.

larly obstreperous. 'I have made these reports speak English,' says Styles in his preface, 'not that I believe they will be thereby more generally useful, for I have been always and yet am of the opinion that that part of the common law which is in English hath only occasioned the making of unquiet spirits contentiously knowing, and more apt to offend others than to defend themselves; but I have done it in obedience to authority, and to stop the mouths of such of this English age, who, though they be confessedly different in their minds and judgments as the builders of Babel were in their language, yet do think it vain, if not impious, to speak or understand more than their own mother tongue.' Bulstrode, in the preface to the second part of his reports, says 'that he had many years since perfected the work in French, in which language he had desired it might have seen the light, being most proper for it, and most convenient for the professors of the law.' But the Restoration brought back Norman-French to the reports, and barbarous Latin to the law records, which continued till the reign of George II."¹

The assent of the crown to petitions is given yet in the French tongue. As the French had obtained such a strong hold it was not to be expected that its use would be at once wholly discontinued even in obedience to an act of parliament, and we find that all through the 15th century, down to the earlier days of Henry VII. (1485-1509), acts of parliament were written in French, notwithstanding that the statute of 1362 had seen fit to order all pleadings in courts to be in English. It would seem to us now that the strong reasons set forth in the preamble to the act of 1362 for the disuse of the French in the courts applied with equal force to parliament itself, and that, to be consistent, acts of parliament should, from that date, have been written in English instead of French. The French, however, finally gave way to the English, "but it did not give way until it poured into English the greatest infusion of foreign words and foreign idioms which any European tongue ever received from a foreign source."²

¹Lives of Ld. Chs., vol. 8, p. 390,
note.

²Freeman, Norman Conquest, vol.
5, pp. 359-60.

XIV. LOCATION OF THE COURT.

§ 89. **Court of chancery migratory.**—Lord Campbell says, in speaking of reforms in the administration of justice introduced during the reign of Edward III., there was introduced about this time (1330) a great improvement in the administration of justice by rendering the court of chancery stationary at Westminster. The ancient kings of England were constantly migrating,—one principal reason for which was, that the same part of the country, even with the aid of purveyance and pre-emption, could not long support the court and all of the royal retainers, and the render in kind due to the king could be best consumed on the spot. Therefore, if he kept Christmas at Westminster he would keep Easter at Winchester and Pentecost at Gloucester, visiting his many palaces and manors in rotation. The *Aula Regis*, and afterwards the courts into which it was partitioned, were ambulatory along with him, to the great vexation of suitors. This grievance was partly corrected by Magna Charta, which enacted that the court of common pleas should be held “in a certain place,”—a corner of Westminster Hall being fixed up for that purpose. In point of law, the court of king’s bench and the court of chancery may still be held in any county of England,—“wheresoever in England the king or the chancellor may be.” Down to the commencement of the reign of Edward III., the king’s bench and the chancery actually had continued to follow the king’s person, the chancellor and his officers being entitled to part of the purveyance made for the royal household. By 28 Edw. I., c. 5, the lord chancellor and the justices of the king’s bench were ordered to follow the king, so that he might have at all times near him sages of the law able to advise him. But the two courts were now by the king’s command fixed in the places where, unless on a few extraordinary occasions, they continued to be held down to our own times, at the upper end of Westminster Hall, the king’s bench on the left hand and the chancery on the right, both remaining open to the hall, and a bar being erected to keep off the multitude from pressing on the judges.¹

¹ *Lives of Lord Chancellors*, vol. 1, pp. 205, 206.

The officers of the chancery lived or lodged together in an inn or *hospitium*, which, when the king resided at Westminster, was near the palace, and when the king traveled he was followed by the chancellor, masters, clerks, and records, and for the purpose of carrying the Rolls a strong pack horse was required, which was provided by some religious house bound to furnish the same; and in the towns where the king stopped during his progress an *hospitium* was provided for the chancery.¹

Edward I., in the twenty-eighth year of his reign, passed a law "that the chancellor and justices of the king's bench should follow him, so that he might have at all times near unto him some sages of the law, which might be able duly to order all such matters, as should come unto the court at all times when need should require."²

§ 90. Court of chancery always open.— Another characteristic of the court of chancery was that it was always open, no matter where the chancellor or the master of the rolls might be. This is stated by Jekyl as follows: "The chancery, as hath been observed, is always open as to issuing of writs and equitable proceedings, and wherever the lord chancellor or master of the rolls is, acts of court may be done by either of them. Upon this known course or law of the court, the chancellors, ever since the twenty-third year of Queen Elizabeth, have in any place they thought fit, and without the solemnity of holding a court as at other times, received petitions directed to them, and made orders thereupon."³

So too we are told by Lord Coke that "this court is the rather alwayes open, for that if a man be wrongfully imprisoned in vacation, the lord chancelour may grant a *habeas corpus* and do him justice according to law, where neither the king's bench nor common pleas can grant that writ but in term time; but this court may grant it either in term time or vacation."⁴ "So likewise this court may grant prohibitions at any time either in terme or vacation."⁵ And again he says: "This

¹ 1 Campbell, *Ld. Chs.*, vol. 1, pp. 257, 258, note.

² 1 Woodeson's *Lectures*, p. 174. The reason here given was expressed in the statute.

³ Jekyl, *Judicial Authority of the Master of the Rolls*, 147.

⁴ 4 Coke's *Inst.* 81.

⁵ *Id.*

court is *officina justitiæ*, out of which all original writs and all commissions which passe under the great seal go forth, which great seal is *clavis regni*, and for those ends this court is ever open."¹

It must not be understood that this summary of the history of the court of chancery is intended to include any changes made in the system in recent years, but, on the contrary, I have purposely confined myself to the "system as it existed in England from the earliest times to the end of Lord Eldon's chancellorship."² In 1852 by statute the whole system of equity was remodeled in England, and "the office of master in chancery was wholly swept away."³ How these changes were brought about and what are the practical workings of the new system would be interesting subjects of investigation but wholly foreign to my present purpose.

The limited amount of space available for this introductory chapter prevents anything more than a bare summary of what I would like to give, but the reader interested in the subject, and especially the student, will find it profitable to follow up the original sources cited in the foot-notes.

¹ 4 Coke's Inst. 72. ² Langdell's Sum. of Eq. Pl. 83. ³ Kerly, Eq. Juris. 288.

CHAPTER II

THE MASTER IN CHANCERY.

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I. HIS APPOINTMENT.

§ 91. The master—His appointment.—As we have already seen in our introductory sketch of the early history of the court of chancery, formerly masters in chancery were appointed by the king, were members of his household, and held their office during life, and, that they were experienced in the law, of great learning, and “well skilled in the chauncerie writing.”¹ Later on they were appointed by the chancellor and were selected from among the clerks, who, from their youth up, had been trained with especial reference to the duties afterward to be required of them.² The appointment of masters in chancery by the chancellor is now held to be an inherent power of the court of chancery, and is the universal rule, unless some other method is provided by statute or rule of the court. Their ancient name, masters in chancery—a translation of *magistri cancellariæ*—is still retained in the federal courts of this country, as in Florida, Illinois, New Jersey, Maine, Massachusetts, Mississippi, Pennsylvania, South Carolina and Vermont, and in other states unless changed by statute. Under provisions of the various statutes masters in chancery are styled “Commissioners in Chancery” in Virginia and West Virginia; “Master Commissioners” in Indiana, Kentucky and Ohio; “Circuit Court Commissioners” in Michigan; “Clerk and Master” in Tennessee; “Master or Commissioner of the Circuit Court” in Arkansas; “Auditor and Master” in Maryland; “Auditor or Master” in Georgia; “Auditors” in New Hampshire; “Registers in Chancery” in Alabama, and “Referees” in most of the other states; but, by

¹ *Ante*, § 27.

² *Ante*, § 12.

whatever name this officer may be known, his duties are essentially the same as those of the English master in chancery, and the practice before him is, in the main, the same as that in the master's office as it formerly existed in England. His designation by a different name in no wise affects the duties of such officer. He is to all intents and purposes a master in chancery and his duties are to act as a master.¹ No matter by what name he is designated, whether "master, auditor or right hand of the court," if appointed in an equity proceeding, he is in fact a master.²

§ 92. **Same — Federal courts.** — A master being an officer of the court must be appointed by the court.³ Under Equity Rule 82 the power of appointing masters is vested in the circuit courts. This rule reads as follows: "The circuit courts may appoint standing masters in chancery in their respective districts, both the judges concurring in the appointment; and they may also appoint a master *pro hac vice* in any particular case."

Under this rule the appointment is complete and effective when it is made and signed by the judges. The law does not require any record to be made of the appointment, nor does any rule of court make the recording of such appointment in a book requisite to its validity.⁴ A master thus appointed is an officer of the court, and no one but the court is entitled to hearing upon the question of his selection. This appointment, like the appointment of a clerk of a court commissioner, is to be made by the court, or by the judge or judges, as the case may be, without notice to any one.⁵ Under this rule appointments are wholly within the discretion of the circuit courts.⁶ The order of appointment is impervious to collateral attack. It can only be attacked by a direct proceeding, and it is not necessary to record the order of appointment in any book.⁷

¹ Dean v. Emerson, 103 Mass. 480, 482; Harding v. Handy, 11 Wheat. 103, 126.

² Kaub v. Ziegler, 11 W. N. C. 488.

³ Finance Company v. Warren, 53 U. S. App. 472, 82 Fed. 525.

⁴ Seaman v. Northwestern Mutual Life Ins. Co., 58 U. S. App. 682, 688,

639, citing Polleys v. Black River Improvement Co., 118 U. S. 81; Marbury v. Madison, 1 Cranch, 137, 156, 161.

⁵ Id.

⁶ Van Hook v. Pendleton, 2 Blatchf. 85, Fed. Cas. 16,852.

⁷ Seaman v. Northwest Mut. Life

~~MASTER~~ IN CHANCERY.

~~Alabama~~—The constitution of Alabama provides that a master in chancery shall be appointed by the court and shall hold office during the pleasure of the court making such appointment."¹ The duties for the appointment of a register are prescribed by the chancellor of the division in which he is situated, such register to hold his office until the chancellor making the appointment.

~~Arkansas~~—The statutes of Arkansas provide that the clerk of the circuit court, by virtue of his office, shall be commissioner of the circuit court with all powers conferred by law on a master or commissioner in

~~Georgia~~—Georgia.—In Georgia there is no provision for the appointment of a permanent master, but instead it is provided by the Code, sec. 4581, that the court, upon the suggestion of either party, or the judge may upon his own motion refer any part of the facts in any particular case to a master to investigate and report the result to the court; the Georgia code provides that the "duties heretofore performed by a master in the superior court shall be performed by an auditor," yet the courts frequently speak of an auditor as "master" or "auditor."²

~~Illinois~~—Illinois.—In Illinois it is provided by statute: "That the several circuit courts may appoint in the respective counties in their circuits a master in chancery; the circuit court in Cook county, and the superior court of Cook county, may appoint for their respective courts as many masters in chancery as there are judges thereof."³ It is also further provided by statute that the tenure of their office "shall be two years, but they may be removed from office by the court for which they are appointed, for good cause shown."⁴

¹ Ala. Co. 80 C. C. A. 212, 86 Fed. 493; 552, 555, 9 S. E. 532; Pool v. Gramling, 88 Ga. 653, 658, 16 S. E. 52; Lilly v. Griffin, 71 Ga. 535, 542; Cook v. Comr's, 62 Ga. 228, 230; Cureton v. Wright, 73 Ga. 8, 18.

² Art. 6, sec. 21.

³ Sanders & Hill's Dig. of Statutes, § 172.

⁴ Burns v. Beck, 88 Ga. 471, 493, 10 S. E. 181; Martin v. Foley, 82 Ga.

⁴ Rev. Stat., ch. 90, § 1.

⁵ Id., § 2.

§ 97. **Same — Indiana.**— In Indiana it is provided by the code as follows: “The judges of the circuit courts in their respective counties shall appoint at least one master commissioner in each county of his circuit, who shall be a resident of the county seat, and as many more as such judge may deem necessary, who shall be competent attorneys in good standing, and who shall receive their appointment in writing from the judge making the same, and shall continue in office until removed by the court.”¹ It is further provided that such master commissioners shall have the power, and discharge the duties which were formerly performed by masters in chancery so far as consistent with existing laws.² By this name — master commissioners — they are constantly designated by the courts.³

§ 98. **Same — Kentucky.**— In this state masters in chancery are called “Master Commissioners,” the statutory provision for their appointment being as follows: “Each circuit court shall appoint a master commissioner for such court, may remove him and appoint another; but no master commissioner shall continue in office more than four years without a reappointment. Before acting, the master commissioner shall be sworn and execute a bond, with surety, to be approved by the court, for the faithful performance of the duties of his office. The bond shall be entered of record in said court, and shall be renewed once in each year, and oftener if required by the court, and a copy thereof, certified by the clerk, shall be evidence in all proceedings in this state.”⁴

§ 99. **Same — Maryland.**— In Maryland the office of master in chancery at one period existed under the inherent jurisdiction of the court of chancery, independently of statute.⁵ Under the constitutional provision that “the judge or judges of any court may appoint such officers for their respective courts as may be necessary,” masters in chancery are appointed and known in that state under the name of “auditor and master.”

¹ Burns' Annotated Stat., § 1462.

Albany v. The Iron Substructure Co.,
141 Ind. 500, 503, 40 N. E. 44.

² Burns' Annotated Stat., § 1468.
See also Stanton v. The State, 82 Ind.
463, 469.

⁴ Rev. Stat. 1899, § 392.

³ Lewis v. Godman, 129 Ind. 359,
361, 27 N. E. 568; Smith v. Harris, 135
Ind. 621-624, 35 N. E. 984; City of

⁵ Townshend v. Duncan, 2 Bland,
45. 60-74, note; Miller, Equity Pro-
cedure, sec. 555.

An auditor in that state is simply appointed to act as auditor, although for many purposes he is clothed with powers corresponding with those exercised by the master in the English court of chancery.¹ In that state the duties of the auditor and master are as follows: The master is the adviser of the court as to matters of jurisdiction, parties, pleadings, proof, and in other respects where he may be of assistance to the court. It is only, however, in cases where the parties do not desire to argue the case before the court that the services of the master are used; whenever an argument is desired by the parties the matter should be presented to the court, and the duties of the master are of an advisory character only. He decides nothing, but merely reports to the court the result of his examination of the proceedings, with a suggestion as to the propriety of the court passing a decree.² Under the Maryland statute the duties of an auditor in stating an account are very analogous to those of a master in chancery.³ His powers and duties are defined by the court in that state.⁴

§ 100. Same — Michigan.—The statute provides for the election of a "circuit court commissioner" in each county of the state, and, in counties having a population of 2,000, or more, two are to be elected. By statute they are "competent to discharge all such duties as have heretofore been performed by masters in chancery and all such other powers as shall be conferred upon them by the several circuit courts according to law."⁵

By statute it is provided that a circuit court commissioner, who discharges the duties of master in chancery in that state, must "be an attorney and counsellor at law of the supreme court."⁶

§ 101. Same — New Jersey.—In New Jersey it is provided by the code that the chancellor may appoint masters in chancery as heretofore. It is presumed that by this provision it is

¹ Townshend v. Duncan, 2 Bland, 45, 75; Trustees v. Heise, 44 Md. 453, 465; Miller, Equity Procedure, sec. 555.

² Townshend v. Duncan, 2 Bland, 45, 56-57; Miller, Equity Procedure, sec. 556.

³ Trustees, etc. v. Heise, 44 Md. 453, 465.

⁴ Dorsey v. Hammond, 1 Bl. (Md.) 468, 467; Townshend v. Duncan, 2 Bl. (Md.) 45, 74-75.

⁵ Rev. Stat. 1882, § 7151.

⁶ Rev. Stat. 1882, § 7183.

meant that the court may appoint masters in accordance with the practice of courts of chancery.

§ 102. *Same* — New York.— Under the practice as it formerly existed in New York, masters in chancery were nominated by the governor, and appointed by him with the consent of the senate. They held their offices for three years, but might be sooner removed by the senate, on the recommendation of the governor. No person could be appointed a master, who was not of the degree of counselor of the supreme court, or solicitor or counselor in the court of chancery; and no master could act as such in any cause or matter in which he was solicitor or counsel, or which was prosecuted, defended, or in any way managed or directed by any solicitor or counselor, with whom such master was, directly or indirectly, connected in business.¹

The masters might be suspended by the chancellor from the exercise of the powers of their office, in cases of any gross misconduct therein, after due notice, and a full opportunity given them of making a defense. The chancellor being required to report such suspension, with the reasons, to the governor, to the end that the master might be removed from office.²

§ 103. *Same* — Ohio. — In Ohio masters in chancery are known under the name of "Master Commissioners," their appointment being provided for by statute, as follows: "The court of common pleas may appoint, in each county, such number of persons as may be necessary, to be master commissioners, who shall hold their office for the term of three years, unless removed by the court for good cause; and the master commissioners so appointed shall have power to administer all oaths required in the discharge of their official duties, or authorized to be administered by the laws of this state."³ The statute also provides for the appointment of special master commissioners;⁴ while the statute further provides that the court may "refer an action in which the parties are not entitled to a trial by jury, to a regular or special master commissioner, to take the testimony in writing, and report the same to the court, and therewith his conclusions on the law

¹ Hoffman, Ch. Pr. 20, 21.

² Id.

³ Bates, Rev. Stat. 1898, sec. 5219.

⁴ Id., sec. 5221.

and facts involved in the issues, which report may be excepted to by the parties, and confirmed, modified, or set aside by the court.”¹ The master is also authorized to “summon and enforce the attendance of witnesses, and grant adjournments, the same as the court.”² Master commissioners must give bond to be approved by the court, and they and special commissioners must be sworn faithfully to discharge the duties of the office.³

§ 104. **Same — Pennsylvania.**— In Pennsylvania prior to January 15, 1894, courts of equity appointed standing masters in chancery, who were vested with essentially the same powers and governed by the same rules as masters in chancery in the circuit courts of the United States; but, by an amendment of the rules in equity, promulgated by the supreme court, of that date, the office of master in chancery was discontinued, with certain exceptions, the result of which is that the office of master in chancery almost disappears from the practice in that state. In lieu thereof the amended rules of court provide for a reference of cases in equity to a person agreed upon, who shall be called a “referee.”⁴

§ 105. **Same — South Carolina.**— In South Carolina it is provided by statute that in certain counties the office of referee and the practice of referring cases to referees shall not exist, and that in those counties “the office of master is established;” and further, that the master shall hold his office under the appointment of the governor, by and with the advice and consent of the senate; that he shall hold his office for four years, and until his successor shall be appointed and shall qualify.⁵ Vacancies caused by “death, resignation, removal from the state, or from any cause whatsoever” are to be filled in the same manner.⁶

§ 106. **Same — Tennessee.**— The clerks of the chancery court in Tennessee are appointed by the chancellor,⁷ and by statute such clerks are “authorized to administer oaths, and perform all the functions of a master in chancery, unless re-

¹ Id., sec. 5222.

² Id., sec. 5223.

³ Id., secs. 5220, 5221.

⁴ 1 Brewster, Eq. Pr., §§ 5175, 5177, 6024.

⁵ Rev. Stat. 1893, secs. 835, 836.

⁶ Id., sec. 840.

⁷ Code, § 892.

strained by the provisions of law; and to exercise all such other powers as are or may be conferred by law.”¹ The clerks of all the other courts “in all equity causes are vested with the powers of clerks and masters;”² and in that state the master in chancery is generally designated as the “clerk and master.”³

§ 107. *Same — Vermont.*— In this state, as in Arkansas and Tennessee, the statute provides that the clerks of the courts shall act as masters in chancery. The statutory provision is as follows: “The clerks of the court of chancery shall be masters and examiners in chancery; and the court may appoint additional masters and examiners in a county, and remove them at pleasure.”

“A master in chancery shall have jurisdiction throughout the state.”⁴

§ 108. *Same — Virginia.*— Here we find the appointment of masters in chancery provided for by the code, and, as in West Virginia, they are called “Commissioners in Chancery.” The provision of the code relative to their appointment is as follows: “Each circuit and each corporation court having chancery jurisdiction or the judge thereof in vacation shall from time to time appoint commissioners in chancery, who shall be removable at pleasure. There shall not be more than four such commissioners in office at the same time for the same court, except that the chancery court of the city of Richmond may have ten, the circuit court of the county of Norfolk eight, the corporation court of the city of Portsmouth six, the corporation court of the city of Manchester six, and the corporation court of the city of Roanoke six, and the corporation courts and the circuit courts of the counties of Augusta, Pittsylvania, Loudoun, Rockingham, Louisa, Frederick, Shenandoah, Rockbridge, Greensville, and the city of Petersburg may each have five in office at the same time, and the counties of Chesterfield, Amherst, and Botetourt may have six.”⁵

§ 109. *Same — West Virginia.*— In this state masters in chancery, as in Virginia, are called “Commissioners in Chan-

¹ Id., § 5900.

² Id., § 5866.

³ Green v. Lanier, 5 Heisk. (Tenn.) 662, 666; Maury v. Lewis, 10 Yerg. (Tenn.) 115, 116; Wessells v. Wessells,

1 Tenn. Ch. 58, 60; Rules of Court, 2 Tenn. Ch. 787 *et seq.*

⁴ Rev. St. 1894, secs. 911, 912.

⁵ § 3319 of Code as amended 1897-98; Supplement to Code, 1898, p. 342.

cery," and their appointment is provided for as follows: "Each circuit court and every court of limited jurisdiction now existing, or which may hereafter be established for any incorporated city, town or village, may from time to time appoint not more than four commissioners in chancery or for stating accounts, except that the circuit court of any county whose population exceeds fifty thousand may appoint not more than eight of such commissioners, who shall be removable at its pleasure, with power to take depositions and to swear and examine witnesses and to certify their testimony. The judge of any court empowered to appoint commissioners in chancery or for stating accounts may in vacation appoint such commissioners with as much effect as if appointed by the court, and they shall have the like powers."¹

§ 110. **Same — Other states.**— It is safe to say that in every state in the Union, perhaps without exception, where the office of chancellor has been abolished and the common law judges vested with equity powers, the office of master in chancery still exists, either under that name or one of similar import, but most generally under that of referee. These courts, under authority given them by the codes, are authorized, by consent of parties, to refer any issue of fact or law to such referees for determination, and may, without the consent of parties, refer any cause to a referee for hearing in any case where a court of chancery would have referred the same to a master.² The hearing before such referees is carried on, in the main, precisely as in case of references to masters in chancery, and, therefore, nine-tenths of what is said relative to the hearing before the latter applies equally to hearings before such referees, by whatever name they are called.

§ 111. **Special master.**— In Illinois it is provided by statute that: "Whenever it shall happen that there is no master in chancery in any county, or when such master shall be of counsel or of kin to either party interested, or otherwise disqualified or unable to act in any suit or matter, the court may appoint a special master to perform the duties of the office in

¹ Rev. Stat., ch. CXXIX, sec. 1, as amended January 30, 1901; Acts of W. Va. Legislature, Regular Session, 1901, p. 121.

² See code provisions of California, New York and other code states.

all things concerning such suit or matter.”¹ So, also, a South Carolina statute provides that: “In case of a vacancy in the office of Master, or in case of the disability of the Master from interest or any other reason, the Court or a Judge thereof may appoint a Special Master in any case, who shall as to such case be clothed with all the powers of Master.”² So, too, in Ohio it is provided by statute that the court may appoint a special master commissioner in any case.³ The power to appoint a special master in a particular case to execute the order of the court is an inherent one in a court of chancery, and one that is frequently exercised.⁴

§ 112. **Bond and oath.**—A master in chancery is not required to be sworn unless it is made necessary by an express statutory provision. The court may unquestionably order the master to be sworn, but if the judge, “knowing the trustworthiness and intelligence of the person appointed, does not require an oath, the want of it does not invalidate his report,” and an exception, based on such a ground, must be overruled;⁵ and no bond is required unless some rule, order of court or statute provides for it.⁶

Some of the states provide for these matters by statute; for example, in Illinois it is provided by statute that: “Every master in chancery, before entering on the duties of his appointment, shall give bond, with security to be approved by the court, and take and subscribe an oath of office, which bond and oath shall be filed with the clerk of the court making the appointment, and spread upon the records thereof;”⁷ and in Georgia it is provided by the Code, section 4584, that the auditor, who performs the duties formerly discharged by a master, before proceeding under the reference made to him, “shall be sworn a true report to render according to the law and evidence, without favor or affection to either party.”

In South Carolina it is provided by statute that a master in chancery shall, within thirty days after notice of his appoint-

¹ Rev. Stat., ch. 90, § 5; *White v. Haffaker*, 27 Ill. 349, 351.

² Rev. Stat. 1893, sec. 843.

³ Rev. Stat., § 5221.

⁴ See further on this subject, *post*, ch. III, § 135.

⁵ *Thompson v. Smith*, 2 Bond, 320, 23 Fed. Cas. 1,092.

⁶ *Seaman v. Northwestern Mutual Life Ins. Co.*, 58 U. S. App. 632, 639, 86 Fed. 493.

⁷ Rev. Stat., ch. 90, § 4.

ment give bond "conditioned for the faithful discharge of the duties of the office," and, in case of failure so to do, his "appointment shall be deemed revoked;" and further, that, before entering upon the duties of his office he shall take in writing, indorsed on his bond, certain oaths of office prescribed by the constitution and by statute, sections 501 and 502. Among other things he must swear that he has not since January 1, 1881, engaged in a duel within or without the state, either as principal or second, and will not during the term of his office "engage in a duel as principal, or aid and abet in such duel as second, or as a party thereto."¹

In Ohio it is provided by statute that the master commissioner shall be sworn and give bond before entering upon the duties of his office.²

New Jersey Chancery Rule, No. 42, requires the master, before he enters upon the execution of his office, to take and subscribe an oath that he will faithfully, impartially and justly perform all duties of the office, according to the best of his ability and understanding.

In some cases, although there is no statute or rule of court, requiring a master to take an oath or give bond, before he enters on the performance of his duty in making a sale of land under an order of court, yet the court will require such oath or bond.³

II. HIS REMOVAL.

§ 113. His removal from office.—In the absence of any statute or rule of court to the contrary, the master in chancery holds his office at the will of the chancellor and may be removed at any time. In Illinois the statute provides that masters in chancery "may be removed from office by the court for which they are appointed, for good cause shown."⁴ Under this statute it is held that the act of removing a master is an administrative and not a judicial one, and that a charge, notice, and trial before removal, not being expressly prescribed, are unnecessary. Masters in chancery in that state perform many

¹ Rev. Stat., secs. 887-889. As to liability of sureties on bond of master in chancery, see 6 Cent. Law Jour. 227.

² Rev. Stat., § 5220.

³ Omaha Loan & Trust Co. v. Bertrand, 51 Neb. 508, 70 N. W. 1120.

⁴ Rev. Stat., ch. 90, § 2.

official duties, as assistants to the chancellors, and, in order that their services may be efficient, they should be persons well qualified to perform these duties, and the circuit courts may determine from their own observation of their official conduct, or in such manner as in their judgment seems best, when occasion requires it, and say that good cause exists for their removal, and then remove them therefor, not acting arbitrarily, but considerately and discreetly.¹ The statutes of Ohio provide for the removal of a master commissioner by the court for good cause.²

III. HIS QUALIFICATIONS.

§ 114. His qualifications.—The United States statutes provide:

“That no person related to any justice or judge of any court of the United States, by affinity or consanguinity, within the degree of first cousin, shall hereafter be appointed by such court or judge, to, or employed by such court or judge in any office or duty in any court of which such justice or judge may be a member.”

“No clerk of the district or circuit courts of the United States or their deputies shall be appointed a receiver or a master in any case except where the judge of said court shall determine that special reasons exist therefor to be assigned in the order of appointment.”³

It has been held that these provisions do not apply to cases where the appointment was made prior to the enactment of the statute; or, to use the language of the court: “The statute does not prohibit one already appointed from continuing to act and perform the duties of his office.”⁴ It was further contended in the same case, that the appointment of the master was void (he being the son of the judge who made the appointment), because no special reasons were assigned therefor in the order of appointment; but the court held that under the circumstances the consent of the parties was inferred. It has been also held that where a master was appointed, who

¹People v. Welty, 75 Ill. App. 514.

²Rev. Stat., § 5219.

³Acts of Congress, 1879, ch. 183, 857.

p 415.

⁴Northwestern Mut. Life Ins. Co. v. Seaman (C. C. D. Ct. Neb.), 80 Fed.

came within the prohibition of the above statutes, and the order failed to state the special reasons existing therefor, the court might permit an amendment to the order *nunc pro tunc*, as of that date, by inserting therein the "special reasons" for such appointment; and, in the case last referred to, the order was amended by the insertion of the following: "The solicitors for the respective parties, having in open court consented to the appointment of said Shields as such master, although he is the chief deputy clerk of this court, and the court now determining that such consent is a sufficient special reason for such appointment."¹

Where the appointment of a particular person as master is not prohibited absolutely, but the court has power to make such appointment under certain conditions, his acts and doings as such master cannot be questioned in a collateral proceeding. However irregular his appointment may be, such appointment clothes him with the insignia of the office, and, in exercising the powers and functions thereof, his acts are at least those of a *de facto* officer, and are valid so far as they concern the public and third persons, and cannot be questioned in a collateral proceeding.²

Where a master is appointed in violation of this statute, he being a clerk of the court and a son of one of the judges, his appointment is impervious to collateral attack, and can only be attacked by direct proceedings to set aside the order of appointment.³

In Pennsylvania, under act of January 24, 1849, it was provided that the judges should not appoint as masters in chancery "any person related or connected with said judges or any one or more of them by ties of consanguinity or marriage;" but by a later act (March 29, 1860), it is provided that the above act shall not apply "where the counsel interested or the parties nominate . . . the master."⁴

¹ *Fischer v. Hayes* (C. C. S. D. N. Y.), 22 Fed. 92.

² *Northwestern Mut. Life Ins. Co. v. Seaman*, *supra*; *Cocke v. Halsey*, 16 Pet. 71; *Hussey v. Smith*, 99 U. S. 20; *Ralls Co. v. Douglass*, 105 U. S. 728.

³ *Seaman v. Northwestern Mut. Life Ins. Co.*, 86 Fed. 498; *Elgutter v. Same*, *id.* 500.

⁴ *Brewster's Eq. Pr. of Pa.*, § 6025; *Pepper & Lewis' Dig.*, vol. 1, pp. 253, 254.

In Illinois the only statutory qualification necessary to make parties eligible to the office of master in chancery is that they "shall be resident of the county for which they are appointed."¹ It is not necessary that the person appointed to the office of master in chancery should be a lawyer unless it is required by statute.²

In New Jersey it is provided by statute that a reference can only be made to a "master in chancery, who shall be a counsellor-at-law of at least five years' standing."³ But whether required to be a lawyer or not, the chancellor should see that the person selected is well qualified to discharge the duties of the office, and this he usually determines from personal observation and acquaintance.⁴

Under the Alabama code, section 653, women are eligible to the office of register in chancery. The code prohibits any register in chancery, or his deputy, from practicing law in the court, in which he is register; or in any case in which he is interested as solicitor.⁵ A woman is eligible to the office of master in chancery in the state of Illinois, and in that state it is not necessary that the party appointed should be an attorney at law.⁶

IV. HIS RELATION TO THE COURT.

§ 115. His relation to the court.—"A master in chancery is an officer appointed by the court to assist it in various proceedings incidental to the progress of a cause before it, and is usually employed to take and state accounts, to take and report testimony, and to perform such duties as require computation of interest, the value of annuities, the amount of damages in particular cases, the auditing and ascertaining of liens upon property involved, and similar services."⁷ The master's office is an extension or branch of the court.⁸ And in other cases the master is called the "arm of the court."⁹ In another

¹ Rev. Stat., ch. 90, § 1.

² *Ennesser v. Hudek*, 169 Ill. 494, 499, 48 N. E. 673; *Schuchardt v. People*, 99 Ill. 501, 39 Am. R. 84.

³ Rev. Stat. 1895, p. 397, § 128.

⁴ *People v. Welty*, 75 Ill. App. 514.

⁵ Code, sec. 667.

⁶ *Schuchardt v. People*, 99 Ill. 501,

39 Am. R. 84. On the eligibility of women to the office of master in chancery, see 11 Cent. L. J. 299.

⁷ *Kimberly v. Arms*, 129 U. S. 512, 523, 9 Sup. Ct. R. 355.

⁸ *Stewart v. Turner*, 3 Edw. Ch. 458; *Simmons v. Jacobs*, 52 Me. 147, 153.

⁹ *Thompson, Corp.*, vol. 5, § 6941,

case he is termed "the court's representative," appointed with special reference to his fitness to perform the duties imposed upon him.¹ He is an officer of the court, acts directly under its eye, and takes no step without its instruction or approval. He makes reports from time to time, and receives the direction of the court thereupon.²

In their various efforts to define the character of masters in chancery, as to whether they are judicial or ministerial officers, the courts differ widely, owing, doubtless, to the different standpoints from which the subject is viewed. One court speaks of the master as a judicial officer, acting as the representative and substitute for the court which appointed him.³ "The master is a judicial officer."⁴ But it is generally said the master "is but the ministerial officer of the court,"⁵ and as such his findings and recommendations have no force or effect other than to aid the court in the performance of judicial duties. They are only advisory.⁶ The confirmation and approval of his report is merely interlocutory and constitutes no decree.⁷ But one court has gone so far as to speak of the master in chancery as both a ministerial and judicial officer, and although "in most instances he acts as a judge, yet it is always with an appeal to the court."⁸ The master, under an order of court, may hear evidence, ascertain the facts proven and report them to the court for approval, but, before such findings of the master become binding, they must be approved by the court. The master is a ministerial and not a judicial officer. Hence, an order of court directing the master to ascertain a fact and then proceed to execute his finding as if it were an order of court is erroneous.⁹ The duties of a

and note 5; *Lehigh Coal, etc. v. Central R. Co.*, 35 N. J. Eq. 426, 427.

¹ *Hoe et al. v. Scott* (U. S. Cir. Ct. D. N. Y.), 87 Fed. R. 220.

² *Wister v. Foulke*, 6 Phil. 26.

³ *Bate Refrigerating Co. v. Gillette* (U. S. Cir. Ct. D. N. J.), 28 Fed. 673.

⁴ *Sculthorpe v. Burn*, 12 Grant's Ch. R. 427, 428.

⁵ *Chicago Bill Posting Co. v. Schuster*, 88 Ill. App. 513; *Hards v. Burton*, 79 Ill. 504, 509.

⁶ *Chicago Bill Posting Co. v. Schu-*

ster, 88 Ill. App. 513; *Fairbury, etc. v. Holly*, 169 Ill. 1, 12, 48 N. E. 149; *Brueggestratt v. Ludwig*, 82 Ill. App. 451, 184 Ill. 24, 41, 56 N. E. 419; *Ennesser v. Hudek*, 169 Ill. 494, 48 N. E. 673.

⁷ *Chicago Bill Posting Co. v. Schuster*, 88 Ill. App. 513; *Levy v. Berkowsky*, 50 Ill. App. 587.

⁸ *Fenwicke v. Gibbs*, 2 Desauss. 629, 635.

⁹ *Boston v. Nichols*, 47 Ill. 353, 359. See also *Wilhite v. Pearce*, 47 Ill. 413.

master in chancery are strictly of a ministerial character. The court has no authority to invest him with power in the nature of judicial duties.¹ Yet, while this is true, some of the duties imposed upon him are quasi-judicial in their character; for example, under a proper order of the court, he hears the testimony, makes rulings upon the admission or rejection of evidence, and, after the conclusion of the evidence, hears the arguments of counsel and determines what facts are proven and what the law is, applicable to the facts so found; yet, after all this, he may not enter a decree or an order, but can only report his conclusions to the court for approval or disapproval. He is only the assistant or adviser of the chancellor, who alone has the power under the law to enter judgments and decrees, and any attempt to confer this latter power upon the master is error and ground for reversal. Thus, in an Illinois case, the court attempted to confer judicial authority upon the master in a foreclosure proceeding, by directing him to ascertain the amount due and then to proceed to sell the premises, without reporting his findings to the court and having a decree of sale entered. Speaking of the propriety of this order Mr. Justice Walker, speaking for the court, says: "This was manifest error. It was, in effect, allowing the master in chancery to find the amount due, and to, in effect, decree its sale, and then proceed to execute his decree. The master has no such power. He is but the ministerial officer of the court, to perform such duties as may be required of him by the chancellor in the performance of his judicial functions. His powers are delegated to him by the court, and the court can confer on him no judicial powers. Those powers are vested in the judiciary, and cannot be delegated to any but persons belonging to that department of government. All the acts of the master become binding only by being approved and adopted by the court. Hence the court alone can find, adjudge and decree so as to bind the parties and the subject matter."²

¹ De Leuw et al. v. Neely, 71 Ill. 473, 474; Shipman v. Fletcher, 91 Va. 473, 509.
² Hards v. Burton, 79 Ill. 504, 22 S. E. 458.

CHAPTER III.

REFERENCE TO MASTER.

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I. DEFINITION AND OBJECT OF A REFERENCE.

§ 116. Reference — Definition and object.— A reference is an order of the court, whereby divers matters, as exceptions, contempts, irregularities, matters of account, etc., are referred to a master to examine, and make a report to the court, to the end that the court may make an order absolute, and determine such matters.¹ A reference is an “order of court, whereby exceptions, contempts, irregularities, matters of account, and such like, are referred to a master to examine, and make a report of to the court, or whereby he is finally to determine or settle some matter.”²

In a suit in equity, unlike an action at law, matters of fact as well as questions of law are by the constitution, and immemorial practice of the court, determined and adjudicated by it. It is often impracticable for the chancellor to investigate the matters of fact arising in a cause, and take the testimony to that end, to state and settle the necessary accounts, which are often very complicated, to ascertain and classify the liens upon the property, and to perform other functions of a similar nature necessary to the proper adjudication of the matters of law and fact arising in the varied and important litigation which pertains to its jurisdiction. Commissioners in chancery are appointed to assist the chancellor, and to relieve him in a

¹ 2 Harr. Ch. Pr. (Ed. 1807), 93.

² Pr. Reg. Ch. 362.

large measure of any other duties incidental to the progress and determination of the cause. For this reason they have been aptly termed the "arms of the court."¹

§ 117. Reference — Definition and object — Continued.—

This extra-judicial mode of investigation is of very great advantage, by relieving the court at its regular term from the performance of burdensome duties and thus enabling it to exercise its regular jurisdiction in a much more beneficial manner.² The object of a reference to a master is for the convenience of the court; to ascertain disputed facts, and to make computations which would take up too much of the time of the court.³

By reason of the large amount of equity business, original and appellate, it would simply be impossible for the court to examine every case *ab ovo* and in detail; but the court must be brought directly to the points of the contest. This can be done only by a preliminary hearing before a competent master, who can take time to examine the case well, and report upon it intelligently and accurately. The effect of this is to eliminate from the controversy that which is undisputed, and to develop the true points of contest. The hearing before the master is not strictly a trial which judicially determines the rights and liabilities of the parties, with a bare appeal to the court, but is a process to develop them for the consideration of the court; the party dissenting from the master's views bringing the real points of the contest before the court by exceptions.⁴

One of the principal objects in referring cases to the master for hearing is to relieve the court from the labor and time of hearing the case either *ore tenus* or on depositions, and to have the assistance of the analysis and substance of the testimony before the master, with proper reference to the testimony of the witnesses, and the page of the testimony where it can be found, to enable the court the easier to determine whether the conclusion drawn by the master from the facts is supported by the evidence.⁵

¹ *Shipman v. Fletcher*, 91 Va. 478, 22 S. E. 458.

² *McDougald v. Dougherty*, 11 Ga. 570, 587.

³ *Taylor v. Read*, 4 Paige, 561, 567.

⁴ *Phillips's Appeal*, 68 Pa. St. 180, 138.

⁵ *Kansas Loan & Trust Co. v. Electric Ry. Co.*, 108 Fed. 702, 704.

It is a "well-established principle, that the courts of the United States, in the exercise of their chancery powers, possess an inherent authority, in proper cases, to order a reference to a master."¹

Of the origin of the practice of referring matters to the masters for decision, the author of *Choyce Cases in Chancery*, writing in 1652, says: "The Lord Chancellour taking advantage of their leisure and opportunity doth many times of late refer matters which have depended in that court and are ready for hearing unto their examination; the which according to their examination and certificate are decreed;" but the people did not take kindly to this new departure, for he adds that "the people do complain much of this new employment of them," and that "it is one (amongst others) of the greatest honors of the Common Laws, that causes are never adjudged or resolved *in tenebris*, or *sub silentio suppressis rationibus*, but in open court, and there upon solemn and deliberate arguments."²

II. WHAT WILL BE REFERRED.

§ 118. What matters will be referred.— Judge Staples of Virginia, in commenting upon the duties of the commissioner in chancery, says: "That the office of commissioner in chancery is one of the most important known in the administration of justice will be universally conceded. His duties are of a grave and responsible nature; he is the assistant to the chancellor. There is no question of law or equity, or of disputed fact, which he may not have to decide, or respecting which he may not be called upon to report his opinion to the court."³

"The line between the matters which the chancellor may determine in the first instance, and those which for convenience and dispatch of business are more properly referable to a master, cannot be drawn with precision; but it may serve as a guide to say that all matters of law should, as far as possible, be first determined by the court and fixed by the decree; leaving for the master only the investigation of such matters of fact as may be necessary to him in making a report or state-

¹ *Thompson v. Smith*, 2 Bond, 320, 28 Fed. Cas. 1,092.

² *Choyce Cas. in Ch.*, p. 70.

³ *Bowers' Adm'r v. Bowers*, 29 Grat. 697, 700; *McClay v. Norris*, 4 Gilm. 370, 386; 2 Barbour, Ch. Pr. 468.

ment of accounts, in accordance with directions in the decree."¹

Ordinarily references to a master are made for the purpose of inquiring into and reporting questions of fact, it not being the habit of the court to refer abstract questions of law; but, in some cases a question of law becomes a question of fact, as in cases of inquiry into the laws of foreign countries. Except in such cases a reference as to the law of a case is never made. Yet where a reference is made to a master with directions to report his conclusions generally, he is frequently required to report conclusions of law as well as of fact. There are many cases in which questions of law are so strongly involved in the facts into which the master is directed to inquire, that the master cannot report upon the fact without also expressing an opinion upon the law as it affects the matter before him. A question referred may be a mixed one of law and fact, as where the master is directed to inquire into and report the title of a party to property in controversy.²

No reference upon a demurrer, or question touching the jurisdiction of the court, shall be made to a master; but such demurrer, etc., shall be heard and determined by the court.³

The forty-fifth section of Lord Bacon's Orders provided: "that no reference upon a demurrer, or question touching the jurisdiction of the Court, shall be made to the Masters of the Chancery, but such demurrers shall be heard and ruled in Court, or by the Lord Chancellor himself."⁴

§ 119. Illustrations of matters which may be referred.—The matters which may be referred to a master are so numerous that it would be folly to attempt to enumerate them, but the following are given as illustrations: When the question is whether a defendant is, by reason of infirmity of mind, incompetent to answer the bill of complaint, the matter will be referred to a master to inquire into the fact.⁵ "A reference may be made to a master to ascertain the facts upon a petition for leave to sue a receiver."⁶ When the question

¹ Hicks v. Hogan, 36 Ark. 298, 301.

⁵ Lee v. Ryder, 6 Mad. 294, where

² Woodson v. Smith, 1 Head (Tenn.), 276; 2 Daniell, Ch. Pr. 1215.

the form of the order will be found.

³ 2 Harr. Ch. Pr. (ed. 1807), 94.

⁶ Farmers' L. & T. Co. v. Central Railroad, 1 McCrary, 832.

⁴ 1 Brown's Ch. Pr. 363.

arises on a bill for partition as to the undivided rights and interests of the parties, the usual course is to direct a reference to a master to inquire and report.¹ Exceptions for scandal, impertinence or insufficiency in pleadings may also be referred to a master.² So where a suit is instituted in behalf of an infant, by a *prochein ami*, the court, on suggestion of its being improperly instituted, will refer it to a master to inquire into the circumstances, and report whether the suit is for the benefit of the infant.³

Where in a bill for specific performance the defendant has put it out of his power by sale or otherwise to convey, the case may be referred to the master to ascertain the damages;⁴ but upon a bill for specific performance the matter will not be referred where the nature of the title is distinctly seen.⁵ Again, upon a bill for the specific performance of a contract for a deed with "usual covenants," it may be referred to a master to inquire what are "usual covenants."⁶

There are certain issues raised by plea which are usually referred to a master. Among these may be mentioned, where a defendant pleads a decree of dismissal of a former cause, for the same matters, in bar of the plaintiff's new bill,⁷ pleas of another suit depending, questions as to the identity of the parties, and as to the identity of the cause of action.⁸ The rule of practice limits references to cases where the truth of the plea can be immediately ascertained on inquiry.⁹

Where a party enters a plea of another suit pending between the same parties, involving the same matters in controversy, the "questions of the identity of the parties and of the identity of the causes of action may also be included in the refer-

¹ Phelps v. Green, 3 Johns. Ch. 802.

² Beach Eq. Pr., secs. 111, 417, 673; Adams' Equity (7th Am. ed.) 380.

³ Garr v. Drake, 2 Johns. Ch. 542.

⁴ Woodstock v. Bennet, 1 Cowen, 711.

⁵ Wilbanks v. Duncan, 4 Desauss. 536; Dominick v. Michael, 4 Sandf. S. C. 394.

⁶ Wilson v. Wood, 17 N. J. Eq. 216, 88 Am. Dec. 231. For an abundance of cases touching references

to masters in matters pertaining to infants, see Chambers, Ch. Juris. of Infants, *passim*.

⁷ Morgan v. Morgan, 1 Atk. 53.

⁸ Tarleton v. Barnes, 2 Keen. 632, 635; Wild v. Hobson, 2 Ves. & B. 105, 110; Emma Silver Min. Co. v. Emma Silver Min. Co., 17 Blatchf. 389, 1 Fed. 39.

⁹ For a full discussion of references of issues raised by pleas, see Emma Silver Min. Co. v. Emma Silver Min. Co., 17 Blatchf. 389, 1 Fed. 39.

ence.”¹ Where a plea sets up matters of fact, the truth of which may be immediately ascertained by mere inquiries, it is usually referred to one of the masters of the court to make the inquiry.²

The foregoing are only given as illustrations, as above stated, of matters which may be referred. As stated by Barbour: “The duties of masters are various and difficult to be specified; for there is no question of law or equity or disputed fact or facts, which a master may not have occasion to decide upon, or respecting which he may not be called upon to report his opinion to the court. And it would be tedious to specify in this place every head of reference to a master; because they are almost as numerous as the matters subject to the jurisdiction of the court itself.”³ References, however, are generally made for either of the following purposes: 1. To take accounts and make computations; 2. To make inquiries; 3. To perform some special ministerial acts directed by the court, such as the sale of property.⁴

§ 120. **Complicated questions of fact—Numerous witnesses.**—Where the facts are complicated and a large number of witnesses to be examined the court should invariably refer the matter to the master. The master, having heard the witnesses and familiarized himself with the case in every step of its progress, is more competent to determine upon the credibility of opposing witnesses, and to judge of the evidence. Being fully possessed of the case, the dispute is apt to be confined to the real grounds of controversy.⁵

In California the court has the power to order a reference in any equity suit, when either party alleges facts showing an accounting to be necessary. A reference should always be made “when the trial of an issue of fact” requires the examination of a long account.⁶ But where the facts are few and the means of settling the controversy readily within the

¹ Beach, Eq. Pr. sec. 675, citing Tarleton v. Barnes, 2 Keen, 632, 635; Wild v. Hobson, 2 Ves. & B. 105, 110.

² Beach, Eq. Pr., sec. 675; Mitf. Eq. Pl. 304; Emma Silver Min. Co. v. Emma Silver Min. Co., 17 Blatchf. 389, 1 Fed. 39; Story, Eq. Pl., § 700.

³ Barbour, Ch. Prac. 467.

⁴ Id.

⁵ Backus's Appeal, 58 Pa. St. 186, 192.

⁶ Jones v. Gardner, 57 Cal. 641, 643. In Illinois the court, in referring the cause to the master to take proof and report the same with conclusions thereon, exercises the power conferred by section 39 of chapter 23 of the statutes. 1 Starr & Curtis,

power of the court, a different rule obtains, thus, where a conveyance, absolute upon its face, is in fact, to secure a debt, the grantee will be required to account for rents and profits, and, while ordinarily a reference to a master will be made to state the account, yet, if the court has the means to do it satisfactorily, and is disposed to do it, no reference need be made, unless both sides desire it and acquiesce in the further delay and expense incident thereto.¹ Unless the matter is of such a character — as the stating of a complicated account — that the practice of the court requires that it must be referred to a master, the court will be governed largely by the wishes of the parties. Even a suit at law may, by consent, be referred to a master. In such a case, where it is stipulated that the matters in controversy shall be tried as if the same were an equitable proceeding, and where the matter involves a stating of an intricate account, the matter should be referred to a master in chancery, or to some skilful accountant as a special commissioner, to state and report an account between the parties; and for that purpose, under a stipulation, the proceeding should be treated and conducted as in chancery, and governed by the rules of practice applicable to trials in chancery.²

§ 121. What part of case will be referred.— A reference to a master may be either —

First. To take and report the testimony.

Second. To take the proof and report with his conclusions; or

Third. To take the proof and report both evidence and conclusions.³

In the first case he reports the *proof* without comment. In the second he reports his *conclusions*, or *findings*, without the *proof* (except when a party, on exception to a holding, requires him to certify the proof upon which he bases same); and, under the third, he takes the evidence and reports both evidence and his *conclusions*.

It is in the discretion of the chancellor, there being no stat-

p. 587. The discretion given by this statute is a judicial one and will not be interfered with by the upper court unless there has been an abuse of it. *Harding v. Harding*. 180 Ill. 481, 498, 54 N. E. 587; *City of Belle-*

ville v. Citizens' Horse Ry. Co., 152 Ill. 171, 38 N. E. 584.

¹ *Jewett v. Cunard*, 3 Woodb. & M. 277, Fed. Cas. 7,310.

² *Stewart v. Kirk*, 69 Ill. 509, 513.

³ *Brown v. McKay*, 51 Ill. App. 295, 297.

ute to the contrary, whether he shall make a special order upon the master to return the testimony with his report, and such order will not be interfered with by the appellate court unless in case of manifest injustice.¹ The court may refer only one branch of a case to the master, or it may refer to him only some particular question upon which the court desires to be advised, or the court, by consent of the parties, may refer the entire case to the master, with directions to take the proofs and report his findings and conclusions thereon.²

Under the Georgia code it is discretionary, in an equity case, with the judge whether or not he will refer any part of the facts to a master.³ Under the provision of the code the court may refer the whole case or any part of the facts to the master, but is not bound so to do; and when a reference is demanded in an equity case by either party, it is the duty of the court to examine the pleadings and determine whether it would be to the interest of the litigants and the court for the reference to be made.⁴

The practice of referring the whole case to the master for determination, thus allowing him to usurp the function of the court, has never been sanctioned except by consent of parties. Lord Bacon's Order, A. D. 1618, and Lord Coventry's Order, A. D. 1675, provided that the matter should be first brought on to a hearing before the court, and "when the court hath heard, and reduced it to particular points, . . . the court may fitly leave such to be reduced to certainty by a master."⁵ In any event the master should swear the witnesses and reduce their statements to writing.⁶

III. AT WHAT TIME A REFERENCE WILL BE MADE.

§ 122. Reference—When it will be made.—In the matter of references there are two crying evils to be guarded against; one is that of referring matters which should properly be tried

¹Arnold v. Slaughter, 36 W. Va. 589, 15 S. E. 250; Freeland v. Wright, 154 Mass. 492, 28 N. E. 678.

²Field v. Romero, 7 N. Mex. 630, 640, 41 Pac. 517.

³Code, sec. 4581; Burns v. Beck, 88 Ga. 471, 493, 10 S. E. 121; Mahan v. Cavender, 77 Ga. 118; Poullain v. Brown, 80 Ga. 27, 5 S. E. 107; Cen-

tral Trust Co. v. Thurman, 94 Ga. 735, 750, 20 S. E. 141.

⁴Martin v. Foley, 82 Ga. 552, 555, 9 S. E. 582; McKenzie v. Flannery, 90 Ga. 590, 595, 16 S. E. 710.

⁵Beames' Orders, pp. 28, 80, 81.

⁶McClay, Adm'r, v. Norris, 4 Gilm. 370; Brockman v. Aulger, 12 Ill. 277.

by the court, and the other is that of making references prematurely. Referring cases to masters unnecessarily not only incurs useless expense and delay for litigants, but, owing to the loose manner in which the case is heard on exceptions, practically doubles the labors of the court, and results in making the master's office a positive hindrance instead of an aid in the administration of justice. So, too, a reference in a cause before it is ready for hearing in the master's office only results in confusion, with additional delay and expense for the parties. Hence before granting a motion to refer a cause to a master the court should be convinced, first, that, under the regular course of chancery, the case is one which properly should be referred to a master, and, second, that the case is ripe for a reference.

"Nothing is perhaps more common in chancery practice than orders of reference improvidently awarded, and few things cause more vexatious delays and a greater accumulation of costs in the course of litigation. Although this practice has been disapproved by the court of appeals and attention was called to it by a distinguished text-writer¹ as far back as the year 1835, the evil can scarcely be said to have abated. This is probably due to the fact that such orders are generally asked at a stage of the cause when a hearing on the merits is not then expected, and upon the loose idea, that so often prevails, of admitting into a chancery cause almost anything that any party desires, *in case it should be needed*. The settled rule, however, in respect to orders of reference is, that before an application for one shall be granted, it must appear with reasonable certainty that an order will be necessary, and it will not be made upon the suggestion that in some contingency one will be required; for it will not do to put the defendant to the trouble and expense of rendering an account until it is ascertained that the plaintiff has a right to demand it;² nor will a reference be made for the purpose of furnishing evidence in support of the allegations of a bill."³

¹ Mr. Conway Robinson in Robinson's Practice, vol. 2, p. 359, old edition. See also Neely et al. v. Jones et al., 16 W. Va. 625.

² Allen et al. v. Smith, 1 Leigh, 231, 252; Minor's Inst., vol. 4, pt. 2, p. 1220.

³ Lee County v. Fulkerson, 21 Grat. 182; Watkins et al. v. Young et al., 31 Grat. 84, 94; 2 Barton's Ch. Pr., p. 629.

§ 123. Reference — When it will be made — Continued —

The issues.— Unless the issues are made by the pleadings there is nothing for the master to act upon, therefore the issues should all be made up before an order of reference is entered.¹ A reference to a master cannot be made until the cause is at issue as to all defendants, or until those who have not answered are defaulted.²

The statute of Illinois provides that: "The court may, upon *default*, or upon *issue joined*, refer the cause to a master in chancery, or special commissioner, to take and report evidence, with or without his conclusions thereupon."³ It is provided in Pennsylvania by supreme court equity rule, that "When a case in equity is at issue upon answer it may be taken from the trial list by the parties, and its trial referred to a person agreed upon by them, who shall be called a 'referee.'"⁴ It sometimes happens that a complainant, after procuring answers of a part of the defendants, is negligent in defaulting or procuring answers from the other defendants. The remedy of those who have answered, if they desire to speed the cause, is to move to dismiss for want of prosecution.⁵ It is the duty of both counsel and the court to proceed with great caution. The record must be ripe for submission, that is, the issues fully made up, all preliminary matters disposed of and the order of reference accurately drawn, so as to show the master at once what is submitted and prevent the wasting of both time and money in the investigation of irrelevant matters.⁶

In a case of accounting the cause should be ripe for reference before an order is made. A reference should not be made solely to enable the parties to take depositions, but the cause should be so far developed by the pleadings and proofs as to show the propriety of taking an account, the basis upon which it is to be taken, and the extent to which it should go.⁷ Referring a cause before the issues are fully made up is an ir-

¹ Ward v. Paducah & M. R. Co., 4 Fed. 862.

² Hall Lumber Co. v. Gustin, 54 Mich. 624, 630, 20 N. W. 616; Vermilya v. Odell, 4 Paige, 121; 1 Edw. Ch. 617; Hastings v. Palmer, Clarke's Ch. (N. Y.) 52; Kelly v. Gartner, 90 Mich. 264, 51 N. W. 278.

³ Rev. Stat. Ill. 1895, ch. 22, § 39.

⁴ 1 Brewster, Eq. Pr., § 5177.

⁵ Id.

⁶ Eubank v. Wright, 2 Tenn. Ch. 538.

⁷ First Nat. Bank v. Parsons, 42 W. Va. 137, 24 S. E. 554.

regularity that may be waived by the parties. An appearance before the master and introduction of evidence after the issues are made up, followed by a failure to object to the report on that ground, is a waiver of such irregularity.¹ If a cause is referred to the master before the issues are made up, upon motion the court should set aside the order, and then, after the issues are complete, again enter an order of reference.

In New Jersey the chancellor is authorized by statute to refer "any cause or other matter which may be pending in the court of chancery" to a vice-chancellor or to any master in chancery, who shall be a counselor-at-law of at least five years' standing, to hear the same and report to the chancellor and advise what order or decree shall be made.² Notwithstanding this statute is apparently broad enough to authorize a reference before the issues are joined, yet, as a matter of fact, in that state no references are made until the issues are all made up. Mr. S. M. Dickinson, clerk of the court of chancery, writes me that "all issues, including those on plea or demurrer, are first made up before any reference is made."

Especially is it true that a reference should never be made until all infant defendants are represented by a guardian *ad litem* and answers filed, and the court should in every case see that such guardian *ad litem* represents them in fact and not merely nominally. The importance of this is well stated and the general loose practice rightly condemned by Judge Smith, as follows: "It is a judicious requirement in chancery practice that minors and other incapable persons shall be represented by guardians *ad litem*, and the law contemplates something more than a mere perfunctory compliance. It is a common practice in some jurisdictions for complainant's counsel to have appointed, as guardian *ad litem*, some clerk in his office, or sometimes even the clerk of the court. Such practice, if known, is inexcusable on the part of the court, reprehensible on the part of counsel, and often results in a sacrifice of the rights and interests of those whom courts are presumed to protect."³ Such guardians *ad litem* should in all cases have

¹ *Butler v. Cornell*, 148 Ill. 276, 35 N. E. 767.

² Rev. Stat. 1895, p. 897, § 128; N. J. Ch. Rules, Nos. 193, 194.

³ *Mortgage Foreclosures*, p. 4.

notice of proceedings in the master's office, and should attend and protect the interests of their wards.

§ 124. **Preliminary hearing.**— All preliminary matters which when disposed of may show a reference to be unnecessary should be heard before passing on a motion to refer. For example, a reference should not be made before passing on a defense, which if sustained, may put an end to the controversy.¹ Where the necessity of examining a long account depends upon the decision of an issue in the action as to whether or not a partnership existed, a reference ought not to be ordered until that issue has been first tried.²

Sometimes the complainant's bill is of such a character as to present a preliminary question which the court must hear and determine before ordering a reference. Thus, where the bill prays for an accounting, the court must necessarily decide whether or not the case is such as to require the defendant to account before referring the case to a master to state an account. If this question is reserved until the coming in of the master's report and then decided in the *negative*, all the expense and delay of the reference will have been fruitless.

Where the rights of the parties in a chancery proceeding are involved and an accounting is to be had, the court should first find and declare the rights of the parties, by an interlocutory decree, and then refer the cause to the master to take and state the account.³ It has been held that a court has no power to order a reference to take an account before a hearing of the cause on its merits, except by consent of the parties, and even then the practice is reprobated. The chancellor must first be satisfied that the complainant is entitled to have an account taken.⁴ But again it has been held that a reference, before an interlocutory decree has been entered, is not erroneous, but simply bad practice.⁵

¹ Commissioners of Wake v. City of Raleigh, 88 N. C. 120.

² Graham v. Golding, 7 How. Pr. 260. On the necessity of a preliminary hearing and order in a case of complicated accounting, see *post*, § 298.

³ Moffett v. Hanner, 154 Ill. 649, 655, 89 N. E. 474.

⁴ Campbell v. Campbell's Adm'r, 8 N. J. Eq. 738, 743.

⁵ Hicks v. Hogan, 36 Ark. 298, 302; Beach, Eq. Pr., § 675.

§ 125. Preliminary hearing — Continued.— Court should first by interlocutory decree fix:

First. Liability to account.

Second. Directing what matters material.

Third. Fix the principles upon which the account should be stated.¹

The court should first determine the rights of the parties, and if it is decided an account should be taken, settle the basis upon which it is to be taken by an interlocutory decree, and then refer the cause to the master;² that is, the court ought to settle the principles of the case, and put them in the form of instructions to the master.³

§ 126. Preliminary hearing — Continued — Loose practice condemned.—The loose practice, too often followed, either by agreement of parties, or on motion, of referring cases to the master involving complicated questions of law, without a preliminary hearing, is condemned by the authorities. Such a practice should not be tolerated. It turns the master and parties loose in a “sea of trouble,” often loads the record down with immaterial evidence and findings, and in the end doubles the labor of both court and master. To prevent this the court should in all complicated cases have a preliminary hearing upon the bill, answer, replication and such proofs as the court may desire, and enter an interlocutory order determining the rights of parties and general principles to be applied in adjusting equities.

The supreme court of Arkansas, in speaking of this question, say: “The aid of a master is invoked, usually, for the investigation of details of facts, and to make orderly statements

¹ Mosier v. Norton et al., 83 Ill. 519, 525; Danforth et al. v. McIntyre, 11 Ill. App. 419, 421; Remsen v. Remsen, 2 Johns Ch. 500, 501; Daniell's Ch. Pr., vol. 2, p. 1169; Ward v. P. & M. R. Co., 4 Fed. 862; Franklin v. Meyer, 36 Ark. 96, 109, 110; Hicks v. Hogan, 36 Ark. 298, 301, 302; McLin v. McNamara, 21 N. C. (1 Dev. & B. Eq.) 407; Cobb v. Jameson, 1 Tenn. Ch. 604; Neale v. Hogthrop, 3 Bland, 551.

² Moss v. McCall, 75 Ill. 190, 197;

Mosier v. Norton, 83 Ill. 519, 525; Danforth v. McIntyre, 11 Ill. App. 417, 421; Riner v. Touslee, 62 Ill. 266; Markham v. Townsend, 2 Tenn. Ch. 713, 719; Wessells v. Wessells, 1 Tenn. Ch. 58, 60; Franklin v. Meyer, 36 Ark. 96; Hicks v. Hogan, 36 Ark. 298.

³ Hunt v. Gorden, 52 Miss. 194; Hudson v. Trenton Locomotive, etc. Co., 16 N. J. Eq. 475; Collyer v. Collyer, 38 Pa. St. 257; McGillis v. Hogan, 190 Ill. 176, 60 N. E. 91.

and summaries. Before that is done there should be a decree upon the rights of the parties upon principles of equity, as they may be affected by the facts to be found by the master, and the hearing for that decree should be upon the pleadings, and such evidence as tends to determine the rights of the parties. If that is done in due order the chancellor might find no reference to be necessary. If one be required, it should be made for the satisfaction of the court, and for the ascertainment of such facts and details as may be necessary to apply the principles determined to the exact settlement of the matters in litigation.”¹

In another case the same court further elucidate the rule as follows: The better practice is for the chancellor first to hear the cause upon the pleadings and such depositions as may enable him to determine the principles to be applied in adjusting the equities of the parties, and then make a reference for such special inquiries, or statements of accounts, as may aid the court in making a definite decree. The line between the matters which the chancellor may determine in the first instance, and those which, for convenience and dispatch of business, are more properly referable to a master, cannot, it is true, be drawn with precision; but it may serve as a guide, to say that all matters of law should, as far as possible, be first determined by the court, and fixed by decree, leaving for the master only the investigation of such matters of fact as may be necessary to him in making a report, or statement of accounts, in accordance with directions in the decree. By this practice the matters of law which inevitably arise before the master, and which must at last be settled on exceptions, are narrowed down to a few, affecting only details, or items, whilst by the looser practice of a general reference by consent, the master is made a sort of vice-chancellor, and almost all the equities of the case are finally determined on exceptions, after much unnecessary delay and expense. A chancellor, after declining to permit a general reference by consent, may often find, upon hearing, that he does not require the aid of a master at all; or, if he does, the matters to be referred will be few and distinct, involving little delay or expense. A reference

¹ Franklin v. Meyer, 86 Ark. 96, 109, 110.

may always be made when found expedient, and the evidence and pleadings already in may be used.¹

Chancellor Kent says that "orders of reference should specify the principles on which the accounts are to be taken, or the inquiry proceed, as far as the court shall have decided thereon; and that the examinations before the master should be limited to such matters within the limits of the order as the principles of the decree or order may render necessary."²

Judge Hammond, of the United States district court for the western district of Tennessee, condemns the usual loose methods of references, in the following vigorous terms:

"The practice adopted in this case, of referring the petition to a master before any decree settling the rights of the parties upon the issues made by the pleadings, has resulted in trying intricate questions of law and fact upon exceptions to the master's report, which does nothing more than ascertain the quantum of damages alleged to have been sustained. It is a practice that has been justly condemned as intolerable, is certainly inconvenient and perplexing to the court, and should not be resorted to in the future."³

§ 127. **Loose practice condemned — Continued.**— The evils resulting from a departure from the regular practice are well stated by Chancellor Cooper of Tennessee, as follows: "I have had occasion heretofore to call the attention of the bar to an erroneous practice in this court, the evils of which are strikingly exemplified in this case. Instead of taking proof with a view to a determination of the rights of the parties, and the settlement of the principles upon which the account between them should be taken as a preliminary to the actual taking of the account, the learned counsel have inadvertently agreed upon a general reference settling nothing. The consequence is that both the clerk and master and the chancellor are compelled, if they act at all, to depart from their proper functions and perform, to some extent, the duties of each other. . . . If you make a general reference to him, without first settling the rights of the parties and giving him spe-

¹ Hicks v. Hogan, 86 Ark., 298, 301, 302.

² Remsen v. Remsen, 2 John. Ch. 494, 500.

³ Ward v. P. & M. R. Co., 4 Fed. 862.

cial directions, he must himself judicially determine these rights before he can take any account at all. If he determines them wrong, the whole labor of taking the account is thrown away. Moreover, no matter what report he makes, the chancellor must, in acting upon exceptions, not only look to the facts bearing upon each exception, but settle the law which regulates the rights of the parties. If he fails to do this, an account is taken without any adjudication of rights at all."¹

The rule has been recognized also by the supreme court of Illinois. The court, after first laying down the rule that "stating the account is the appropriate work of the master," and that the "court will not undertake to perform it," add that, "the court should first declare, by interlocutory decree, the rights of the parties and the rule to be adopted in stating the account, and then refer the cause to the master in chancery."²

From a standard text-writer we quote the following approval of the more correct practice: "The ordinary investigation of facts carried on before the master is simply an arrangement for the sake of convenience. The judge, who hears the cause, has not time to pay his undivided attention to the minutiae of every suit; and is, therefore, content to adopt the opinion of an officer delegated to look into the proofs. With a further view to convenience, and also to the saving of expense, it became allowable, and customary, to defer the proving of various matters until a decree had been obtained, for then the topics essential to the questions which the judge contemplates deciding are pointed out with certainty and precision."³

§ 128. Preliminary hearing — Continued — Question may be referred to master.— It must not be understood that this preliminary hearing must necessarily be before the court, but, on the contrary, it may be referred to the master and the interlocutory order entered on the coming in of his report. It is the common practice to permit incidental inquiries by a master prior to the principal labor which rests upon the court.⁴

¹ Cobb v. Jameson, 1 Tenn. Ch. See also Daniel, Ch. Practice, vol. 2, 604, 607. p. 1169, note.

² Mosier v. Norton, 83 Ill. 519, 525.

⁴ Simonds Rolling Mach. Co. v.

³ Gresley, Eq. Evidence, p. 503. Hathorn Mfg. Co., 83 Fed. 490; Law-

Any issue, whether preliminary and incidental or pertaining to the main issues involved in the litigation, may be referred to a master with authority to take testimony and report thereon to the court, such report, of course, being advisory only and subject to the revision of the chancellor. On the preliminary hearing to determine whether an accounting should be had, the only evidence, as a general rule, material or competent, is such as goes to prove or disprove the complainant's right to an accounting.¹ As this preliminary hearing involves the determination of questions of fact, the interlocutory order should find facts upon which to base the same, not mere inferences.²

§ 129. Preliminary hearing — Continued — When unnecessary.— Cases where the court may order a reference before entering an interlocutory decree are exceptions to the general rule.³ A defendant may waive the necessity of such interlocutory decree.⁴ Under the old English practice, by consent of parties, accounts might be examined into before the hearing, but Harrison says: "The common method now is, not to examine into a matter of account till after the hearing."⁵ Lord Bacon's Order No. 50 provided that in cases of accounting the cause should first come to a hearing, that they may receive some direction, except both parties before a hearing consent to a reference to expedite the hearing.⁶ It has been held that admissions in the pleadings may dispense with the necessity for an interlocutory decree, finding a reference to be necessary and directing the method of stating the account.⁷

§ 130. When reference may be made at once.— Where a party pleads another suit pending for same cause of action, he must, at the filing of such plea, obtain an order of reference to a master to examine and report whether the plea be true.⁸

rence v. Dana, 4 Cliff. 1, 87, Fed. Cas. No. 8,136; Field v. Holland, 6 Cranch (U. S.), 8, 22.

¹Standish v. Babcock, 48 N. J. Eq. 386, 22 Atl. 734; Hudson v. Trenton Locomotive, etc. Co., 16 N. J. Eq. 475.

²Kahn v. Smelting Co., 102 U. S. 641, 26 L. Ed. 266.

³Franklin v. Meyer, 36 Ark. 96, 109.

⁴Carter v. Alston, 3 N. C. (2 Hayw.)

237; Dozier v. Sprouse, 54 N. C. (1 Jones Eq.) 152; Lattimore v. Dixon, 65 N. C. 664; Protchett v. Schaefer, 11 Phila. 166.

⁵2 Harr. Ch. Prac. 94.

⁶Beames' Orders in Chy., pp. 23, 24.

⁷Burns v. Rosenstein, 135 U. S. 449. See also Scott v. Pinkerton, 3 Edw. Ch. 70.

⁸1 Barb. Ch. Pr. 125, and cases cited.

The case will then be heard upon plea and the master's report, and upon these the court will decide as to the validity of the plea.¹ Upon the filing of such plea it should be immediately referred to the master without being set down to be argued.² Where a plea of the defendant sets up the pendency of another suit between the same parties for the same cause of action, it is not the usual practice to set the matter down for argument, the practice in such cases being to move a reference to a master to ascertain the truth of the matters stated in the plea. This practice is based on the theory that a plea setting up another suit between the same parties, for the same cause of action, pending in the same court, was obviously good in substance, and that by setting the plea down for argument, the only question that can be raised is whether the plea is defective in form.³ But this practice does not apply to a case where the plea sets up the pendency of another suit in another jurisdiction. In such a case the complainant has the right to have the plea set down for argument to determine whether the matters set out in the plea, if true, operate to prevent the court from entertaining further jurisdiction.⁴

Upon a motion to put the complainant to his election to proceed either at law or in equity, where the two courts have concurrent jurisdiction, the question arises whether the suits are for the same matter. If upon such application it appears that they are not for the same matter the court does not refer it to the master, but if the court has any difficulty in determining whether they are for the same matter or not, a reference is directed, and all proceedings stayed until he reports thereon.⁵

§ 131. When too late to order a reference.—The order of reference should be made before any action whatever is taken by the master, because after such action is taken an order

¹ *Hart v. Philips*, 9 Paige, 298. pp. 697, 692; *Zimmerman v. So Relle*, 80 Fed. R. 417, 421.
For form of plea see 2 Barb. Ch. Pr. 406; *Beames' Pleas in Equity*, 134, 230.

² *Daniel v. Mitchel*, 1 Ver. 484; *Baker v. Bird*, 2 Ves. 672; *Wild v. Hudson*, 2 Ves. & Bea. 105, 110.

³ *Daniell, Ch. Pl. & Pr.* (5th ed.), text.

⁴ *Mills v. Fry*, 8 Ves. & B. 2.

⁵ *Zimmerman v. So Relle*, *supra*. In this case the defendant set up the pendency of a suit in the state court for the same subject-matter, and the court held as stated in the text.

nunc pro tunc is a nullity. An order referring a cause to a master to take testimony can only be binding upon the parties when made prior to the action of the master.¹ Yet, if there is an appearance and participation in the taking of evidence without an order, parties cannot question the authority of the master to act, but the subsequent entry of an order of reference would amount to nothing.² Of course, if there was in fact a previous order of reference, but for some reason it was not entered of record, an order might subsequently be entered *nunc pro tunc*, but this is a wholly different question.³ The motion to refer a cause to a master must be made in apt time. It comes too late when the case is called for trial, unless it is a case of accounting, which should properly be referred to a master.⁴

IV. TO WHOM A REFERENCE WILL BE MADE.

§ 132. Reference—To whom made—Selection of master.—After the court has decided that a reference is proper in a particular case the next step is to determine to whom the matter shall be referred. This duty is one often requiring great care on the part of the court, and one frequently of great importance to the parties because of the magnitude of the interests involved and the special qualifications necessary to properly discharge the duties required of the master. The practice indulged in by some attorneys of having cases referred to certain masters, under arrangement to divide the master's or stenographer's fees, is reprehensible, and, when divulged to the court, will surely bring down upon all parties concerned a well merited rebuke. The master, and attorneys as well, should never forget that they are officers of the court, and that in discharge of their respective duties they are only aiding the court in the administration of justice, and that any contracts or agreements of the nature referred to are a violation of confidence reposed by the court in its officers and render the parties thereto liable to punishment for contempt of court. It is believed to be not an unusual thing for what are

¹ *Hawley v. Simons*, 157 Ill. 218, 224, 41 N. E. 616.

² *Id.*

³ *Id.*

⁴ *Lilly v. Griffin*, 71 Ga. 535, 542.

considered reputable law firms in our large cities to have standing contracts with certain masters that they will send them all foreclosure and other *ex parte* references, where a mere suggestion of counsel, made in response to a question of the court, determines to whom the reference shall be made, under contract to divide the fees. To prevent such combinations, disgraceful alike to the master and counsel, the court should always determine, without suggestion of counsel, to what master a reference will be made.

The practice of canvassing the list of masters to see who will, for the least money, discharge the duties under a reference in a given case — in other words, of letting a reference out to the lowest bidder — met with severe condemnation in a recent federal case.¹ If the parties to such a transaction deserved the rebuke administered by the court, what would the court say to the master and counsel who agree to have a certain cause referred to such master under an arrangement that they will get all they can out of the parties to the suit and then divide the spoils? To prevent the possibility of such practices, which it is feared are too common, causes should be referred to the masters in *rotation*. Daniell says: "According to the ancient practice of the court, all references to a master used to be made to one of the two masters sitting in court, as assistants to the lord chancellor or master of the rolls, when the reference was made; but the modern practice, where there has been no previous reference, is to refer it '*to the master in rotation*,' and, where there has been a previous reference, *to the master to whom this cause stands referred*.'" ²

Under the English practice the name of the master to whom the cause was to be referred was not inserted in the decree, but the reference was to the "master in rotation," or "to the master to whom the cause stands referred." If there had been no reference in the cause, the decree referred it to the "master in rotation," while if there had been a previous reference, the decree referred it "to the master to whom the cause stands referred," and it was irregular to take the decree to any other master. Where there had been no previous reference the

¹ *Finance Company v. Warren*, 53 1837, vol. 2, p. 789; 2 Harr. Ch. Pr. 93; U. S. App. 472, 82 Fed. 525. Prac. Reg. 305.

² Chan. Pr., ed. 1846, p. 1345, ed.

name of the "master in rotation" was ascertained by the sitting master and by him marked upon the back of the decree.¹

These two masters, who anciently sat upon the bench with the lord chancellor or master of the rolls and to whom references were made, were themselves selected "according to an ascertained rotation." Newland says: "The masters attend the lord chancellor and master of the rolls at the sitting of the court, *according to an ascertained rotation*, take their seats upon the bench, and remain there until they are permitted to retire, which is usually soon after the sitting, that they may attend to the business of their respective offices."²

It was the duty of the clerk of the public office of the masters in ordinary to make out the *rotas* for the masters respecting all their different attendances in the public office, in court, at the rolls, and in the house of lords, and "to deliver these lists, not only to the masters, but to the deputy registers as their guide in filling the references to the respective masters."³ By this method of selection of masters for service in court by rotation, and by making the references to such masters as were on duty each day in court, we see that references according to the "ancient practice," as well as the modern, were in fact made to the masters *in rotation*. Some fair means of this kind, securing an equitable distribution of the business of the court among its several masters, should be adopted. It is suggested, for example, that where there are two masters references might be evenly divided between them by sending all cases having even numbers to one and all those having odd numbers to the other. The only reasonable objection that could be urged against this course is that it sends a case to a given master by the accident of numbering, without any reference to his qualifications for the discharge of the duties thus imposed upon him, whereas it may be the desire of the court to refer a given case to some particular master, because of his known qualifications and fitness to investigate and report upon the matters in controversy. How-

¹ 2 Smith's Ch. Pr. 87, 88.

² 1 Ch. Pr. 7, 8. That these masters who sat in court each day, served in rotation, see also 1 Harr. Ch. Pr. 58, where in speaking of the masters

he says: "They are assistants or associates to the chancellor and master of the rolls, and sit with them in court by turns, usually two at a time."

³ Newland's Ch., vol. 1, p. 11.

ever this may be, the court should see that a fair and equal distribution is made between its masters, and whatever plan is adopted the court should select the master independently of all suggestions on the part of counsel. I am glad to note that one court in this country, appreciating the importance of these suggestions, adopted a rule, applicable to a certain class of cases, calculated to prevent any favoritism or improper influence. In New Jersey it is provided by Chancery Rule No. 45, that in all references in divorce and partition, and in applications for sales and mortgages of lands of infants, lunatics and habitual drunkards, shall be to special masters designated by the chancellor, "and who are not to be nominated by the parties or their solicitors."

§ 133. *Successive references.*—For obvious reasons the court should never split up a cause by referring different branches of it to different masters, but, on the contrary, each successive reference should be "to the master to whom this cause stands referred." Where a second or subsequent reference becomes necessary in the progress of a cause, they should be made to the same master to whom the cause was first referred, if he remains in office and is competent to act.¹ All references in the same case should be to the same master unless, for special reasons, the court should direct otherwise. By rule of court, promulgated by Lord Eldon, 1818, it was provided that all references of answers for insufficiency, scandal or impertinence, made in the same cause, should be to the same master.²

It is in general not good policy to refer different branches of the same case to different masters. The reports when they come in may be hopelessly inconsistent, and in such a condition that no decree can be based on either or both together.³

In New Jersey it is provided by Chancery Rule No. 72, that where several exceptions are taken to an answer on the ground of impertinence, scandal or insufficiency, they shall all be referred to the same master.

§ 134. *Number of masters.*—The rule has always been to make a reference to a single master; and not only were refer-

¹ Leggett v. Dubois, 3 Paige, 477.

² 1 Swanst. 128.

³ For a case of this character where the court could see no way out ex-

cept by setting all orders of reference aside, and referring the whole case to a new master, see Waterman v. Buck, 63 Vt. 544, 22 Atl. 15.

ences thus made singly, but each master in chancery executes the orders of reference made to himself independently of all the other masters.¹ But to this rule that references were made to only one of the masters there were exceptions; thus, when the reference was taken for the examination of court rolls touching any customs, "the copies were not to be referred to any one master, but to two at least."² Under Lord Bacon's order, references touching the examinations of court-rolls were not to be referred to any one master, but to two masters at the least.³ We are also told that, under certain circumstances, the chancellor referred the propriety of a certain decree to two masters.⁴

§ 135. **Special master.**— Unless prohibited by statute it is one of the inherent powers of a court of chancery to make a reference to a special master to perform any duty required by the order of appointment. It is quite common and necessary for the court to resort to the aid of a special master for many purposes.⁵ In appointing a special master the court must designate who such special master shall be, "otherwise it will not appear that any one can execute the power."⁶ The authority to make such appointment is entirely discretionary with the court. An Illinois statute provides that the court, under certain contingencies, may appoint a special master.⁷

The enumeration of these contingencies under which the court may appoint a special master would seem to exclude the power to appoint in the absence of such contingency; yet the supreme court of that state held that the power to make such appointment was discretionary with the chancellor and refused to compel by *mandamus* a reference to the regular master.⁸ Under the above statute, where the regular master in chancery is a party to the suit, it is not only proper, but the duty of the court to appoint a special master.⁹ So, too, under a statute of South Carolina authorizing the presiding judge, "in case of

¹ Newland's Ch. Prac., vol. 1, p. 9.

² 2 Harr. Ch. Prac. 94; Toth. 48.

³ Beames' Orders in Ch., p. 24; Tothill, Proceedings, 48, 49; Cura Canc. 427; Prac. Reg. Ch. 363, 364.

⁴ Spence, Eq., vol. 1, p. 415, note.

⁵ Davis v. Davis, 80 Ill. 180, 184.

⁶ Alexander v. Wolley, 4 Ill. App. 225.

⁷ Ante, § 111.

⁸ White v. Haffaker, 27 Ill. 349.

⁹ Gilliam v. Baldwin, 96 Ill. App. 323.

the disability of the master from interest or any other reason," to appoint a special master, it is the province of the presiding judge to decide upon the disability of the master, and to appoint such special master, and the supreme court will not interfere, except where he has abused his discretion.¹

Where a matter requires personal inspection in order to properly pass upon the issues presented and to settle the various equities and rights of the parties, it is within the power of the chancellor to appoint one or more special masters or commissioners to make such personal inspection, and report thereon to the court. Such a reference is not to obtain a judicial decision of any question, but merely to inform the conscience of the court. The court might decide from the evidence alone, but it promotes justice, where personal inspection of premises is desirable, to have the same done by men of practical and scientific skill.²

§ 136. **Time to object to a reference.**—If a party desires to object to the person selected by the court to act as master upon a reference, it is his duty at the time of the appointment to make his objection. It is too late to make such objection before the master when proceeding to execute the order or on appeal.³ While the parties to a suit should not be permitted to select the master to whom the cause should be referred, for the reasons stated, yet, if there is any valid ground of objection to the services of the master named by the court, it should be made known at the time of the reference. The party's day in court, his time and place for making objection, is when the order of reference is made.⁴ The party cannot claim that he had no notice of the appointment if he had notice of the entry of the order of reference.⁵ He must object at the earliest opportunity. After he has proceeded to a hearing before the master on a reference and the master made his report and has filed exceptions to the report, it is too late to call in question the propriety or legality of the reference. Filing exceptions

¹ *Verner v. Davis*, 26 S. C. 609, 2 S. E. 114; *Beach, Eq. Pr.*, § 676.

² For a case in which this course was pursued, see *Newark Plank Road Co. v. Elmer et al.*, 9 N. J. Eq. 754.

³ *Tutt v. Lane*, 50 Ga. 339, 349; *Dow v. Seely*, 29 Ill. 495.

⁴ *Seaman v. Northwestern Mutual Life Ins. Co.*, 58 U. S. App. 632, 639.

⁵ *Mott v. Harrington*, 15 Vt. 185, 195.

constitute a waiver of objections to the reference. A party cannot lie by, and take the chance of a report in his favor, and then avail himself of an objection of this kind when he finds the report is adverse to his interest.¹ He must raise the question in apt time by objection or motion. He will not be permitted to speculate on the chances by acquiescing in silence until the order is executed and then objecting if the result is unsatisfactory.² Where there is no objection made on a motion to refer the issues in a cause to a master, such reference is held to be by consent.³

A party having a knowledge of an error or irregularity will be held to have waived his right to complain unless he avails himself of his right to object at the proper time. He will not be permitted to proceed with the mental reservation that if he succeeds in obtaining a favorable report from the master it is all right, but if the master finds against him he will refuse to abide the result. Thus, where a reference was directed to a master who had, prior to the appointment, been counsel for one of the litigants, neither party objecting, and the master certifying that he acted in the reference at the pressing request of both parties, the court held that the party against whom the master reported could not raise that question on appeal from the report, having taken the chance of the master's finding in his favor.⁴

§ 137. **Master must be disinterested.**—The proper administration of justice requires that the master, like a judge, shall be absolutely disinterested. To render his labor of assistance to the court he must be absolutely free from even a suspicion of bias or partiality. For this reason an attorney is incompetent to act as commissioner or master in chancery in a cause in which he is engaged. A bare statement of the proposition would seem to be sufficient, but the following cogent reasons are given, adopting the language of Judge Staples:⁵ "In the nature of things the commissioner must often examine the witnesses in the absence of counsel, and it is easy to see how frequent are the opportunities afforded him of per-

¹ Johnson v. Swart, 11 Paige, 385.

² Dow v. Seeley, 29 Ill. 495.

³ De Cordova v. Korte, 7 N. M. 678,
41 Pac. 526.

⁴ Cotter v. Cotter, 21 Gr. Ch. R. 159;
Holmsted's Ch. Orders, 86.

⁵ Bowers' Adm'r v. Bowers, 29 Va.
697, 701.

verting the meaning of the witness, if so inclined; and whether he is so inclined or not, the danger of his doing it if he is interested. In the manner of taking the accounts, in the minute and complicated calculations to be made, and in the conclusions arrived at, a commissioner may easily perpetrate the grossest injustice without detection, unless by counsel and courts thoroughly conversant with such subjects. These considerations and numerous others which might be mentioned show how essential it is that the commissioner should not only be absolutely impartial, but even free from the suspicion of partiality. That the attorney of one of the parties to a suit cannot be a competent commissioner in that suit would seem to be too clear for argument. However elevated the counsel may be, his feelings, and even his judgment, will be insensibly influenced by his position, his association and conversation with his client, his witnesses and his friends. No one expects the counsel to be disinterested. It is not desirable he should be so. His allegiance and his duty are to his client. He must give to the latter the best of his ability and his service. And therefore, in all the cases involving this question, it has ever been held that an attorney is incompetent to act as judge, juror, commissioner in chancery, or in any judicial capacity whatever, in a cause in which he is the counsel of one of the parties." Being of counsel to one of the parties is made a disqualification to act as master by statute in Illinois. The statute provides that whenever it shall happen that there is no master in chancery, or when such master shall be of counsel, of kin to either party interested, or otherwise disqualified or unable to act, the court may appoint a special master.¹ Accordingly, in a case where one of the counsel of the parties to a cause was appointed special master to execute the decree, it was held to be error, Judge Walker remarking that "the master is the agent of the court, and must exercise his judgment in enforcing the decree, and as such must be left free from partiality or bias."²

¹ Rev. Stat., ch. 90, § 5.

65 Barb. 272; *Wilkinson v. Vorce*, 41

² *White v. Haffaker*, 27 Ill. 349. Barb. 370, 373; *Spinks v. Davis*, 32 Miss. 152; *Com. v. Gibbs*, 4 Gray, 146; See also *Brown v. Byrne*, Walker's Ch. (Mich.) 453; *Stebbins v. Brown*, *Wilhite v. Pearce*, 47 Ill. 413.

§ 138. Master must be disinterested — Continued.— Justice to the person selected as master requires that he should not be placed in an embarrassing position by reason of his previous connection with the case or otherwise. Requiring a master to pass on disputed questions of fact, some of which are within his personal cognizance by reason of his having been previously receiver, places the master in an awkward position, and renders his action open to unpleasant criticism no matter how faithfully he may have discharged his duty.¹ In the Illinois case above referred to, the supreme court of that state condemn the practice of appointing a solicitor of one of the parties as master in even still stronger terms. Judge Walker, speaking for the court, says: It is highly improper to appoint a solicitor of one of the parties as special master to execute the decree. In all legal proceedings, and at every stage of a cause, courts scrupulously guard against intrusting the execution of its mandates to persons having any interest in the cause. The law, for wise purposes, acts alone through disinterested agents. It will not tempt those having an interest in any way to abuse its process, for the purpose of promoting selfish ends. The relation of attorney and client is so intimate, and the duty of attorney to protect the interest of the client is so rigid, that it can hardly be supposed that he would be willing, even if he were a disinterested person, to be intrusted with the enforcement of the legal rights of his client. His position would be embarrassing, and he would feel at every step that his preconceived notions of his client's rights, his anxiety to advance his interest, must, in case of dispute as to the mode of executing the decree, incline him to decide in his client's favor. Such a position, it seems to us, would never be sought, and it should not be imposed by the court.² It seems superfluous to add that a court will never appoint a party to a suit to act as master in such cause for any purpose whatever. It is a maxim of the law that no man can be judge in his own case.³ So scrupulously exact are the courts in this regard that they will not, even in a case where all parties consent, appoint

¹ For a case of this kind see *Mason v. Pewabic Mining Co.*, 100 Fed. 340, 343.

² *White v. Haffaker*, 27 Ill. 349, 351.

³ *Huntington County Com'rs v. Heaston*, 144 Ind. 583, 41 N. E. 457; *State, Sansone v. Wofford*, 111 Mo.

526, 20 S. W. 286.

as special master one of the parties to the suit to state an account.¹ The court, if it finds it necessary to avail itself of the services of a master to aid in the administration of justice, will be careful to see that the person selected is one whose unbiased judgment can be relied upon, and not one whose acts must necessarily be looked upon with suspicion.

V. WHEN A REFERENCE IS NECESSARY.

§ 139. **Reference — When necessary — Complex and intricate accounting.**— A complex and intricate account is an unfit subject for examination in court and ought always to be referred to a master.² In a case of this character, where counsel failed to have a reference made to state the account, the supreme court of Illinois say: "There has been no reference to a master, but a mass of figures is embodied, and counsel, in effect, say, we want the supreme court to do the labor of stating, making the computations and give us the result, in a written opinion of such account. We have repeatedly said that an intricate and complex account is not a fit subject for examination in a court of justice; that counsel cannot impose upon us the duties which appropriately belong to a master in chancery."³ In this case counsel did all the figuring and the court was only asked to verify the computation, and, as the matter rested entirely in computation, it was thought nothing would be gained by a reference to a master, and that objections to his report would not abridge the labor which the court was asked to perform, but in this counsel were mistaken. The rule announced in this case is strictly adhered to in all matters of account. If at all complicated, the cause must be referred to the master to render a concise and accurate statement of the accounts, so the same may be readily comprehended, and any objection taken passed upon understandingly.⁴

¹ *Horne v. Greer* (Ch. App. Tenn.), 43 S. W. 774.

² *Patten v. Patten*, 75 Ill. 446; *Dubourg v. United States*, 7 Pet. 625.

³ *Sallee v. Morgan*, 67 Ill. 376.

⁴ *Steere v. Hoagland*, 39 Ill. 264; *Bressler v. McCune*, 56 Ill. 475; *Hewitt v. Dement*, 57 Ill. 500; *Riner v.*

Touslee, 62 Ill. 266; *Groch v. Stenger*, 65 Ill. 481; *Moss v. McCall*, 75 Ill. 190; *French v. Gibbs*, 105 Ill. 523. *Beale v. Beale*, 116 Ill. 292, 5 N. E. 540. *Stewart v. Kirk*, 69 Ill. 509; *Mosier v. Norton*, 83 Ill. 519; *Sconce v. Sconce*, 15 Ill. App. 169; *Daly v. Catholic Church*, 97 Ill. 19; *Moffett*

This labor, which the law devolves upon the master, is a labor that counsel will not be permitted by stipulation, or otherwise, to impose on the court, and if the lower court assumes to perform it the decree will be reversed.¹ But where the parties by stipulation impose upon the trial court the burden of the investigation of complicated accounts and thus by consent place error in the record, the upper court may take them at their word and affirm the decree of the trial court.² It is not proper in a partition case for the court to attempt to state the account by offsetting the claims of one party against the other,³ and it cannot be expected that the court will go through a mass of evidence and state an account, but in all such cases the cause must be referred to a master to state the account.⁴

§ 140. **Complex and intricate accounting — Continued.**— In a case of complicated accounting parties will not be permitted to throw upon the court clerical labor of an accountant by compelling it to go through the accounts. A reference to a master to take and report the testimony alone is insufficient. The cause should be referred to a master to take the testimony and state the account, and the objection to any other course is one which the court will, of its own motion, interpose for its protection from any unnecessary labor sought to be imposed upon it.⁵ If parties desire to present questions arising upon taking an account to the upper court for review, it is absolutely necessary to have the case referred to a master

v. Hanner, 154 Ill. 649, 39 N. E. 474; *Hurd v. Goodrich*, 59 Ill. 450; *Patten v. Patten*, 75 Ill. 446; *Cooper v. McNeil*, 9 Ill. App. 97; *Gibbs v. Meserve*, 12 Ill. App. 613; *Pulliam v. Pulliam*, 10 Fed. 23, 27, Fed. Cas. 11,463a; *Ransom v. Winn*, 59 U. S. (16 How.) 295; *Peyton v. Smith*, 22 N. C. (2 Dev. & B. Eq.) 325; *Tiel v. Roberts*, 5 Tenn. (4 Hayw.) 86; *Quayle v. Guild*, 83 Ill. 553.

¹ *Miller v. Dyas*, 31 Ill. App. 156; *Huling v. Farwell*, 33 Ill. App. 238, 240, and cases cited; *Moss v. McCall*, 75 Ill. 190; *Patten v. Patten*, 75 Ill. 446, 447, 448; *Daly v. Catholic Church*,

97 Ill. 19; *French et al. v. Gibbs*, 105 Ill. 523; *Moffett v. Hanner*, 154 Ill. 649, 654, 655, 39 N. E. 474; *McManomy v. Walker*, 63 Ill. App. 259, 277; *Mosier v. Norton*, 83 Ill. 519; *Beale v. Beale*, 116 Ill. 292, 5 N. E. 540; *Sallee v. Morgan*, 67 Ill. 376; *In re Hemiup*, 3 Paige Ch. 305; *Hurd v. Goodrich*, 59 Ill. 450, 455.

² *Riner v. Touslee*, 62 Ill. 266.

³ *Blackaby v. Blackaby*, 185 Ill. 94.

⁴ *Daly v. Catholic Church*, 97 Ill. 19, 22; *Payne v. Newcomb*, 100 Ill. 611; *Quayle v. Guild*, 83 Ill. 553.

⁵ *Weary v. Andrews & Co.*, 58 Ill. App. 380, 382, and cases cited.

so that the questions may be raised on exceptions to his report. In a case where the statement of the account by counsel covered eleven printed pages of their briefs, the supreme court of Illinois say: "A complex and intricate account is not a fit subject for examination in court." The upper court will not perform the duties of a master at the request of counsel.¹ So, if a party desires to assign for error the failure of the court to re-refer a cause to a master for further examination, he must enter his motion at the proper time.²

In equity a court may, without consent of parties, refer a cause involving a long account.³ In Pennsylvania it is held that when there is a contrariety of testimony, the cause should be referred. Thompson, J., speaking for the court, says: "We wish it to be remembered that, in all cases in equity, where there is a contrariety of testimony, the case must go to a master, and his report must come up on the appeal. His finding of facts is somewhat like a special verdict, and must not be omitted. Its soundness is tested on exceptions in the court below, and the decision on these exceptions comes before this court. One portion of the grounds against error in equity cases is unemployed, when a court undertakes to decide on the testimony itself. Besides, it imposes on this court the burden of studying the whole testimony in revising that decision, when otherwise it would only be necessary to examine so much of it as was passed upon in the specific exceptions below."⁴

So stringent is the rule that, where accounts involve large sums of money and the items of which are contested by the parties, the matter must be referred to a master to state the account, that when exceptions are sustained to different items of a report, the court should again refer the cause to the master to restate the account and give the dissatisfied party an opportunity to object to the second findings. When this course is pursued it can always be determined by the upper

¹ *Hewitt v. Dement*, 57 Ill. 500, 507; *Jones v. Gardner*, 57 Cal. 641; *Moss Whittemore v. Fisher*, 182 Ill. 243, 255, 24 N. E. 636; *v. McCall*, 75 Ill. 190; *Patten v. Patten*, id. 446; *State v. Orwig*, 25 Iowa, 280; *Topliff v. Jackson*, 12 Gray, 565.

² *Id.*

³ *Williams v. Benton*, 24 Cal. 424; ⁴ *Clark's Appeal*, 62 Pa. St. 447, 451.

court what items of the account were approved and what were rejected. But when a decree is not based on a master's report, showing what items of account were allowed and what rejected, it is impossible for the upper court to say whether certain items were considered or whether they were not. The record ought to show what items were rejected and what allowed. In the absence of such a showing it may be that the lower court *did* the very thing which the contesting party insists it did not do; for example, the court may have allowed, in making up an aggregate sum, the very items which it is claimed were rejected, and may have thrown out other items instead. In other words, a decree in a case of accounting, not based on a master's report, leaves the upper court to grope in the dark as to what items were admitted and what rejected, and thus renders it impossible for the latter court to say whether the lower court, as to the items complained of, erred or not.¹

"Where accounts involve large sums of money, and the testimony as to the rights of the parties is conflicting and unsatisfactory, in conformity with the rules of chancery practice, the cause must be referred to a master to render a concise and accurate statement, so that the same may be readily comprehended, and any objection taken passed upon understandingly. . . . The court should first declare, by interlocutory decree, the rights of the parties and the rule to be adopted in stating the account, and then refer the cause to the master in chancery. . . . Counsel will not be permitted, by stipulation or otherwise, for their own convenience, to impose upon an appellate court the performance of duties that pertain to the office of master in chancery."² And in such a case, where the trial court has undertaken to state the account, the upper court will reverse the action of the trial court, unless it satis-

¹ Beale v. Beale, 116 Ill. 292. In this case the upper court reversed the lower court, for the reasons stated in the text, and remanded the cause with directions to re-refer "the cause to the master to state the account."

² Mosier v. Norton, 88 Ill. 519, 525;

Bressler v. McCune, 56 Ill. 475, 482; Riner v. Touslee, 62 Ill. 266; Groch v. Stenger, 65 Ill. 481, 483; Danforth v. McIntyre, 11 Ill. App. 417, 421; Quayle v. Guild, 88 Ill. 553, 555; Daly v. St. Patrick's Church, 97 Ill. 19; Koon v. Hollingsworth, 97 Ill. 52; Moss v. McCall, 75 Ill. 190, 196.

factorily appears that justice has been done, and will remand the cause with directions to refer to the master to state the account.¹

VI. WHEN A REFERENCE IS UNNECESSARY.

§ 141. **Reference — When unnecessary.**— In cases other than accounting, it is purely within the discretion of the court whether it will refer the matter to a master or not; and even in cases of accounting, where the items are few and the matter in no way complex, it is not error to refuse to refer the same to a master. “A reference is ordered when the court desires aid in coming to a conclusion of fact. But, if such conclusion can be reached without a reference, it need not be ordered. In the case at bar the amount claimed was represented by a short account in no way complex. It was proved to the satisfaction of the court and the conclusion was easily reached.” Hence, it was held that the court committed no error in dispensing with a reference and that the matter was wholly within its discretion.² In a case other than a complicated accounting it is not error to refuse to refer a chancery case to a master. The usual practice, which greatly relieves the court, is to refer a cause to the master, but chancery “courts have the power to hear the whole case without a reference, which they often do.”³ But when there are no complicated accounts to be settled it is not error to refuse to refer to a master.⁴ Where there is no complication in a matter or difficulty in ascertaining the amount to be paid, there is no necessity of referring a case to a master. In such a case the court may, if he chooses to do so, make the computation, and such is the usual practice.⁵

Where there is no controversy as to the amount of a party's claim and nothing remains to be done but to make a calculation of interest from admitted data, it is competent for the chancellor to make such calculation without the aid of the master.⁶ Such a course is certainly to be commended when

¹ Id.

⁵ Stewart v. Duffy, 116 Ill. 47, 55, 6

² Brown v. Grove (C. C. of App., 4th Cir.), 80 Fed. 564.

N. E. 424.

³ Carter v. Lewis, 29 Ill. 500, 503.

⁶ Chambers v. Wright, 52 Ala. 444, 451; Taunton & Brooks v. McInnish,

⁴ Land Co. v. Peck, 112 Ill. 408, 431; Stewart v. Duffy, 116 Ill. 47, 6 N. E. 424.

46 Ala. 619, 624; Savage v. Berry, 2 Scam. 545, 548.

there is no contest as to the sum due, and all the facts to ascertain it are admitted by the parties whom it is to affect.¹ So, too, in the following cases it has been held that a reference to a master is unnecessary: Where the items are few and not complicated;² where the action involves a short account in no way complex;³ in a case where there are no counter-claims and no complicated or intricate matters of account to be investigated, and the party's claim consists of a single item.⁴

§ 142. Reference — When unnecessary — Continued. — Where there is no account to be stated other than making a computation of the amount due upon the notes or bonds secured by a mortgage, it is within the judicial discretion of the chancellor to hear the witnesses himself, instead of having their testimony taken by the master;⁵ where nothing is to be done but compute the amount due on the face of the papers, such computation should be made by the court, or the clerk;⁶ where there is no dispute as to the credits;⁷ where the evidence is all written, and a decree thereon can be rendered without difficulty;⁸ also, where the court can decide the questions upon the pleadings and proof submitted at the preliminary hearing.⁹ In some cases it is held that the court may state an account without the aid of a master.¹⁰

Sometimes the peculiar circumstances of a case will warrant the court in declining to refer a cause to the master, where, ordinarily, a reference would be a matter of course. For example, in a case where the complainant's motion to continue

¹ Thornton's Adm'r v. Neal, 49 Ala. 590, 592.

² May v. May, 19 Fla. 373.

³ Brown v. Grove (C. C. of App., 4th Cir.), 42 U. S. App. 508, 25 C. C. A. 644, 80 Fed. 564.

⁴ Glos v. Gerrity, 190 Ill. 545, 547, 60 N. E. 833.

⁵ Belleville v. Citizens' Horse Ry. Co., 152 Ill. 171, 189, 38 N. E. 534; Craig v. McKinney, 72 Ill. 305, 314.

⁶ Allis v. Insurance Co., 97 U. S. 144.

⁷ Walker v. Summers, 9 W. Va. 533; Chambers v. Wright, 52 Ala. 444.

⁸ Levert v. Redwood, 9 Porter, 79, 94.

⁹ Tillotson v. Gesner, 33 N. J. Eq. 313; Darby v. Gilligan, 37 W. Va. 59, 28 S. E. 737.

¹⁰ Emery v. Mason, 75 Cal. 222, 16 Pac. 894; Wheeler v. Billings, 72 Fed. 301, 18 C. C. A. 573; Jewett v. Cunard, 3 Woodb. & M. 277, Fed. Cas. No. 7, 310; Montanye v. Hatch, 34 Ill. 394; McLean v. State, 64 Tenn. (8 Heisk.) 22; Pomeroy v. Winship, 12 Mass. 513, 525, 7 Am. Dec. 91; Bailey v. Westcott, 6 Phila. 525, 25 Leg. Int. 173; Pierce v. Thompson, 23 Mass. (6 Pick.) 193.

an injunction was denied, and thereupon he dismissed his bill, upon motion of the defendant to refer to a master to state the damages by reason of the injunction, the court denied the motion because it was shown to the court by affidavits that the defendant had been offered a greater price than had been agreed to be given by the complainant, and that at a later period he would probably receive a still greater advance. For this reason the court deemed the application to be premature.¹

VII. REFERENCES IN CASES OF DECREES PRO CONFESSO.

§ 143. Reference — Decree *pro confesso* — Discretion of the court to enter without reference or proof.— In case of defaulted adult defendants in chancery it is discretionary with the court to enter a decree at once or to hear evidence of witnesses or examine the complainant under oath.² Where a bill is taken as confessed upon default of the defendant, proof beyond the exhibits and *pro confesso* order is unnecessary. It is entirely discretionary with the court whether it will hear any evidence in support of the allegations of the bill. Indeed the allegations of the bill in each case are admitted to be true; the examination of the exhibits is not for the purpose of proving the truth of such allegations, but simply to ascertain the sum due.³ Therefore it is always competent, in case of adult defendants, upon a default to enter a decree at once without proof, or to hear the evidence in open court, or to refer the cause to take and report the evidence, as in ordinary cases; yet, ordinarily, the latter course is safer and preferable for the complainant.

Although in an ordinary case, where the defendants are adults and the bill affects their own personal interests, it is not necessary, where they are defaulted for want of an appearance, or where they file answers admitting the truth of the allegations of the bill, to refer the matter to the master to take proofs in support of the bill; yet where a defendant was sued as trustee, and by his answer admitted the truth of all the facts set up in the bill, and his co-defendant — a corpora-

¹ Featherstone v. Smith, 20 Grant's Ch. R. 474.

² McClay v. Norris, 4 Gilm. (Ill.) 370, 384.

³ Moore v. Titman, 83 Ill. 358, 366.

tion sued as guardian — answered stating that it had no knowledge of the facts, that it had inquired as to their truth and from information received, knew of no reason for doubting their truth, the court held that “the more correct practice would have been to refer the case to a master, and have him take testimony and make a report on the facts alleged in the bill. Then any decree the court might have made would have been founded on facts established by proof, and not on mere allegations of the bill admitted by the answer. A case might easily arise under the latter mode of proceeding which would not commend the confidence of a court, and which, if permitted to prevail, might work great injustice to persons ultimately interested.”¹

§ 144. *Decree pro confesso* — Continued — When court should enter without reference or proof.—A final decree *pro confesso*, entered without requiring the complainant to establish the allegations of his bill by proofs, cannot be insisted upon as a matter of right upon the defendant making default, but is purely within the discretion of the court. When the complainant will be required to make such proof and when he will not is accurately stated by Mr. Justice Bradley speaking for the supreme court. Referring to a report made by Hoffman, master, to the chancellor of New York, he says: “A carefully prepared history of the practice and effect of taking bills *pro confesso* is given in *Williams v. Corwin*, Hopkins Ch. 471, by Hoffman, master, in a report made to Chancellor Sanford, of New York, in which the conclusion come to (and adopted by the chancellor), as to the effect of taking a bill *pro confesso*, was that ‘when the allegations of a bill are distinct and positive, and the bill is taken as confessed, such allegations are taken as true without proofs,’ and a decree will be made accordingly; but where the allegations of a bill are indefinite, or the demand of the complainant is in its nature uncertain, the certainty requisite to a proper decree must be afforded by proofs. The bill, when confessed by the default of the defendant, is taken to be true in all matters alleged with sufficient certainty; but in respect to matters not alleged with due certainty, or subjects which from their nature

¹ *Bristor v. Tasker*, 185 Pa. St. 110, 26 W. N. C. 115, 19 Atl. 851.

and the course of the court require an examination of details, the obligation to furnish proofs rests on the complainant."¹

Where a decree is entered *pro confesso* and without requiring proofs in support of the bill, it will not be entered "as of course according to the prayer of the bill, nor merely such as the complainant chooses to take it; but it is made, or should be made, by the court, according to what is proper to be decreed upon the statements of the bill assumed to be true."² The fact that the court hears evidence in support of the bill does not change the rule in the least, and it is wholly immaterial whether the evidence heard by the court, or reported by the master, is sufficient to sustain such allegations or not. Under the well recognized practice and the statutory provisions, when the defendant, by a default, confesses the truth of the allegations of the bill, no proof is required to sustain the decree based thereon.³

§ 145. Decree pro confesso—Continued—Minors.—It is not proper to take a decree *pro confesso* against minors, but as to them, full proof must be made. Evidence must be taken either in open court or upon reference to a master.⁴ It makes no difference that the answer of the guardian *ad litem* admits the allegations of the bill. The proper course is to refer the cause to the master to take the proof and report thereon,⁵ and the evidence must be preserved in the record.⁶ For this

¹Thomson v. Wooster, 114 U. S. 104, 111.

²Id. 113. See also Geary v. Sheridan, 3 Ves. 192, and Rose v. Woodruff, 4 Johns. Ch. 547.

³Boston v. Nichols, 47 Ill. 353, 357, 358; Gault v. Hoagland, 25 Ill. 266; Stephens v. Bichnell, 27 Ill. 444, 81 Am. Dec. 242; Harmon v. Campbell, 30 Ill. 25.

⁴McClay v. Norris, 4 Gilm. (Ill.) 370, 385; Enos v. Capps, 12 Ill. 255; Cost v. Rose, 17 Ill. 276, 278; Reavis v. Fielden, 18 Ill. 77, 81; Tibbs v. Allen, 37 Ill. 119, 129; Rhoads v. Rhoads, 43 Ill. 239, 249; Mills v. Dennis, 8 Johns. Ch. 367; Wilhite v. Pearce, 47 Ill. 413; Barnes v. Hazleton, 50 Ill. 429; Hall v. Davis, 44 Ill. 494.

⁵Mills v. Dennis, 8 Johns. Ch. 367. For a proper order of reference in such a case see Id., p. 371. See also Ingersoll v. Ingersoll, 42 Miss. 155; Johnson v. McCabe, 42 Miss. 255; McIlvoy v. Alsop, 45 Miss. 365; Wright v. Miller, 1 Sandf. Ch. (N. Y.) 103; Walton v. Coulson, 1 McLean (U. S.), 120, Fed. Cas. 17,132; Reavis v. Fielden, 18 Ill. 77, 81; Wilhite v. Pearce, 47 Ill. 413; Rhoads v. Rhoads, 43 Ill. 239, 249; Sconce v. Whitney, 12 Ill. 150; Hitt v. Ormsby, 12 Ill. 166.

⁶Id. For the various methods of preserving evidence in chancery practice, see White v. Morrison, 11 Ill. 361 and note, annotated edition.

reason the cause, after the answer of the guardian *ad litem* is filed, should be referred to the master that he may take and report the evidence,¹ this being the simplest and easiest method of preserving the evidence, as such report, when filed, becomes a part of the record.²

§ 146. Decree *pro confesso*—Effect of, without a reference or proof.—A decree *pro confesso*, carefully based on the allegations of the bill and not extending beyond them, is binding on the parties. A confession of facts properly pleaded dispenses with proof of those facts, and is as effective as if the facts were proved; and a decree *pro confesso* regards the statements of the bill as confessed. Such a decree is as binding and conclusive as any decree rendered in the most solemn manner.³ A default, like a demurrer, only admits material facts properly alleged.⁴ A default does not admit conclusions;⁵ therefore a decree *pro confesso* cannot bind the defendant beyond the fair scope of the allegations and prayer of the bill.⁶ In other words, a party cannot get more by a decree *pro confesso* than by a decree upon full proof before the master or the chancellor.⁷

VIII. CHANGING A REFERENCE FROM ONE MASTER TO ANOTHER.

§ 147. Reference—Changing from one master to another.—Anciently, as now, each master executed the orders of reference made to himself independently of all the other masters;⁸ and the proceedings under an order of reference should be completed by the master to whom the cause has been referred, but if for any reason this cannot be done, they may, by order of the court, on a special motion made for that purpose, be transferred to any other master to be com-

Rhoads, 48 Ill. 239, 249, § 527.

v. Wooster, 114 U. S. 104.

Miller, 149 Ill. 195, 87 Ill. 241; *ahm v. Dietsch*, 15 Ill.

. Bode, 24 Ill. App. 219;

Shlenk, 28 Ill. App. 433.

v. McCall, 1 Tenn. Ch.

640, 643; *Ross v. Ramsey*, 3 Head (Tenn.), 15, 17; *Goodhue v. Churchman*, 1 Barb. Ch. R. 596; *Story's Eq. Pl.*, § 405.

⁷ For rights of defaulted defendants on hearing before master see *post*, ch. V, div. X, "Defaulted Defendants—Rights of," §§ 211-213.

⁸ Newland, *Ch. Practice*, vol. 1, § 9.

pleted.¹ Under a reference to a master he must perform the duties in person. He cannot delegate his authority, nor perform his duties by a subordinate. Even where the master signed the report, the body of the report appearing to be in the same hand that drew the bill, the court refused to confirm it.²

The policy of the law is to allow no interference with the master while engaged in the discharge of his duties under a reference. Even the court will do so reluctantly. After a cause is submitted to a master by an order of reference it is not proper to attempt to procure an order of court upon a matter which is for the master. The jurisdiction of the master will not be thus interfered with.³

After a cause has been referred to a master it cannot be withdrawn except by setting aside the order of reference, which will only be done for special reasons, such as sickness of master, or other cause, which would prevent him from attending to the business.⁴ A master should not be removed except on some substantial legal ground.⁵ It is provided by statute in New Jersey that it shall be lawful for the chancellor, by rule of court, to fix and determine to what masters references shall be made, and to "remove and change the same at his pleasure."⁶ Any reason which, if brought to the attention of the court at the time of making the appointment, or of entering the order of reference, would be a valid ground against the selection of the particular person as master, constitutes a valid reason for setting aside the appointment, unless known to the party at the time and waived by a failure to object at the proper time; for example, in Canada it was held that when a master has been professionally concerned for any of the litigants in reference to the matter in dispute or any other

¹ *Bishop v. Williams*, Walk. Ch. (Mich.) 423.

² *Stone v. Stone*, 28 N. J. Eq. 409. See *post*, § 892.

³ *Nelson v. Gray*, 2 Chy. Cham. (Canada), 454; *Henna v. Dunn*, 6 Mad. 340.

⁴ *Beach*, Eq. Pr., sec. 683; *Daniell's*

Chan. Pr. 1168; *Anon.*, 9 Ves. 341; *Gibbon's Appeal*, 104 Pa. St. 587.

⁵ *Goldberger v. Manhattan R. Co.*, 8 Misc. 441, 23 N. Y. S. 176. For a case in which the court denied a motion to remove a special master, see *Mason v. Pewabic Mining Co.*, 100 Fed. 340, 348.

⁶ *Rev. Stat.* 1895, p. 897, § 181.

matter, it is sufficient ground for changing the reference.¹ Where in the course of a suit it becomes necessary to add, as a party, the master to whom the cause stands referred, the reference will be changed on an *ex parte* application by the plaintiff.²

§ 148. Changing from one master to another — Continued — Death of master.— Where a master, to whom a reference has been made, dies, the court will order that the several matters referred to him be transferred to another, together with all books, papers, etc., concerning the cause.³ In the case of the death of a master in chancery it is proper for the court to order that all matters referred to him be referred to some other master for the purpose of finishing the reference, and for this purpose we find the following ancient form entered March, 1689:

“It is hereby ordered, that the several matters which have been by former Orders referred to Sir William Beversham, Knight, deceased, shall, either by motion or petition (as desired), be transferred to Samuel Kecke, Esq., one of the masters of this Court, who is to proceed therein, as the said Sir William Beversham was to have done; and to that purpose, it is further ordered, that all the books, papers, deeds, writings and accounts that concern the cause so referred to the said Sir William Beversham, be transmitted to Samuel Kecke, Esq., when they shall be demanded.”⁴

§ 149. Changing from one master to another — Continued — Practice.— Changing an order of reference is effected by the entry of a subsequent order which should properly consist of two essential parts: First, a revocation of the former order, and second, a reference to the second master, with a direction to transmit all the books, papers and documents. Unless the grounds for changing the reference appear in the proceedings they should be brought before the court by proper affidavits. When a cause is referred to a master it cannot be

¹ Bigelow v. Bigelow, 6 P. R. 124; and Boyd v. Simpson, cited in Holmsted's Ch. Orders, 86.

² Weldon v. Templeton, 1 Chy. Ch. R. 360; Holmsted's Ch. Orders, 86.

³ 2 Harr. Ch. Pr. 96; Pr. Reg. Ch. 865.

⁴ Beames' Orders in Chy., p. 286.

withdrawn from such master except by order of court. Such an order will not be made unless upon notice to all parties interested, and then only upon very special occasions, such as the incapacity of the master to act by reason of illness.¹ Notice is required so that parties in interest may have knowledge of the acts and doings of the new master;² besides it is the right of a party to appear and resist such motion. Notice is required ordinarily of an application to the court to change a reference, that is to set aside the order and refer the cause to some other master.³

¹ Gibbon's Appeal, 104 Pa. St. 587,
591.

² Id.

³ McConnell v. McConnell, 8 Chy.
Ch. R. (Ont.) 122.

CHAPTER IV.

MASTER'S AUTHORITY.

I. ORDER OF REFERENCE..... § 150-163
II. THE PLEADINGS..... 164-166
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I. ORDER OF REFERENCE.

§ 150. Master's authority — Order of reference.—The master has ordinarily no power to perform any act or in any manner whatsoever interfere or intermeddle with any pending suit or matter, except as directed by an order of court. Exceptions to this rule are few in number and depend wholly upon some statute. The Illinois statute authorizing masters in chancery, under certain contingencies, to direct the clerk of the court to issue writs of *ne exeat* and injunction may be mentioned as an example of such exceptions.¹ An order of reference is an interlocutory decree entered in a pending suit sending some matter or issue to a person, or persons, specially selected and named therein, with instructions to examine the same or perform the act specified and make and return to the court a report thereon. The thing directed to be done or performed may be *quasi*-judicial in character, such as hearing the evidence, determining and reporting as to the rights or interests of the parties; or it may be purely ministerial, such as the sale of mortgaged premises under a decree of foreclosure.²

The authority vested in the master in a given case, by an order of reference, is either direct or implied. It is direct when the specific act to be performed by the master is set out in the order, and it is implied where some act is necessarily to be performed by the master in order to discharge such specific duty. An example of the first is where the master is directed to state an account, and as an example of the second it is that he may use all the usual means necessary to enable him

¹ Rev. Stat., ch. 90, § 6; ch. 97, § 4; ch. 69, § 2. ² *Snyder v. Stafford*, 11 Paige, 71, 76.

to properly state the account. Thus, when a cause is referred to a master to state an account, and no special directions are given in the order of reference, it is the plain duty of the master to follow the ordinary rules in taking the account.¹ So, too, in a reference to a master for any purpose, the order need not particularly authorize him to take testimony, for this power is implied if the subject-matter is only to be ascertained by testimony.² So, in the sale of property by a master, although not specified in the order, it is implied that he must observe the usual methods employed in making such sales to protect the interests of all parties. For example, he must sell during the usual business hours and may adjourn the sale from time to time, as necessity may require.

§ 151. When and by whom entered.—As to when a case is “ripe for a reference” is a subject that has been fully examined in a previous chapter.³ We there saw that the issues must all be made up—answers and replications all filed or parties defaulted,—and that preliminary hearings must first be had in cases requiring it; so nothing now remains to be added except to say that the order of reference must be entered before anything is done by the master. As it is the source of his authority, it is unnecessary to say that he is powerless until the court enters the order. Unless there is an order of reference entered previous to any action on the part of the master, it is useless to enter an order *nunc pro tunc*. That an order referring a cause to a master can only be binding upon the parties when made prior to the action of the master is too clear for argument. An order *nunc pro tunc* can only be entered in a case where the court in fact made a previous order but not entered. Of course, unless such previous order was made, an order *nunc pro tunc* would amount to nothing.⁴ If there was in fact an appearance and participation in the proceedings in the master’s office, parties might not be permitted to question his authority;⁵ but if it is true that parties cannot by consent validate an act of the master where he goes beyond the power conferred by the order of reference, it is difficult to see how an appearance, in a case where there has been no order, could give any vitality to his

¹ *Izard v. Bodine*, 1 Stock. 309.

² *Story v. Livingston*, 13 Pet. 359.

³ *Ante*, §§ 122, 123.

⁴ *Hawley v. Simons*, 157 Ill. 218—

224, 53 Ill. App. 287, 41 N. E. 616.

⁵ *Id.*

acts. So, under the New York code, a referee who proceeds under a stipulation of the parties, without appointment by the court, acts without authority, "and his report has no more legal force than a communication from any other gentleman who might address the court on the subject of the suit."¹

The order of reference, like any other order, must be entered by the court, and when so entered is binding upon the master until reversed or revoked by the power that made it. The master has no right to question the propriety of its entry or the correctness of its terms, but should proceed to execute it. If it is ambiguous or contains manifest error upon its face he should call the attention of the court to it that it may be corrected. The question has arisen where there were several judges acting in the same court, as to who has the authority to enter the order. For example, in Massachusetts an order of reference may be made by a single justice, and from any order made by him referring the cause to a master, or from any order refusing to require the master to report the evidence, an appeal lies to the full court.² In one case counsel attempted to usurp the power of the court by entering the order of reference. It would seem unnecessary to add that, no matter whether by consent or not, the court treated the pretended order as a nullity. This was a foreclosure case where the decree was entered *pro confesso*, and as the default of the defendant admitted the truth of the allegations of the bill, it was held in the upper court that this irregularity constituted no ground for reversal; that admitting the master's report to be a nullity, still the record showed the decree to have been properly entered.³

§ 152. Must not be too broad.—An order of reference must be founded on pleadings and proofs, and cannot be made more extensive than the allegations of the parties.⁴ The court has no power to refer matters not thus put in issue, and to do so is to turn the master loose without a bridle. Such a course devolves the discharge of judicial duties upon a ministerial

¹ Litchfield v. Burwell, 5 How. Pr. (N. Y.) 341, 343.

² Parker v. Nickerson, 187 Mass. 487, 492; Bowers v. Cutler, 165 Mass. 441, 443, 43 N. E. 188.

³ Trower v. Bernard, 87 Fla. 226, 231, 20 So. 241.

⁴ Consequa v. Fanning, 3 Johns. Ch. 587, 595; Gordon v. Hobart, 2 Story, 243, 260, Fed. Cas. 5,608; Wycoff v. Combs, 28 N. J. Eq. 40; 2 Dan. Ch. Pr. 1221 and note.

officer.¹ The order, therefore, must not be too broad, but, on the contrary, should be fairly within the issues raised by the pleadings, otherwise it may be reversed by the upper court.² It cannot "go beyond the pleadings of the parties."³ It is also the duty of the lower court, when it discovers that it has entered an erroneous order, to correct it at once by modifying it or setting it aside, as shall be proper.⁴ The order of reference should not remit to the master power which can only be exercised by the court. An order, therefore, which purports to give to the master's findings the effect of a judgment and authorizes the issuance of an execution thereon is erroneous. It not only seeks to vest in a master judicial power, but it also deprives the parties of their right to except to the report of the master.⁵

It is not competent for a court of chancery, of its own motion, or upon the request of one party, to abdicate its duty to determine by its own judgment the controversy presented and devolve that duty upon any of its officers.⁶ But it has always been within the power of the court, with the consent of all parties, to refer to a master the entire decision of a case upon all the issues, both of fact and of law,⁷ and such references have become in late years a matter of more common occurrence than formerly.⁸ The power is incident to all courts of superior jurisdiction.⁹ So, too, the general language of an order of reference must be construed in connection with the pleadings. Applying this principle, it was held that a requirement upon the master to report the amount due from certain persons for the land in controversy, "or any other person," will embrace only such persons as are parties to the suit.¹⁰

§ 153. **Must not be ambiguous.**—If the master finds it impossible to take the account as directed in the order of reference he should certify that fact to the chancellor, who, if

¹ *De Louw v. Neely*, 71 Ill. 473.

110, 120; *Stapler v. Hurt's Ex'r*, 16

² *Arnett v. Welch's Ex'rs*, 46 N. J. Eq. 543, 20 Atl. 48.

Ala. 799, 805.

³ *Branger v. Chevalier*, 9 Cal. 353, 361.

⁶ *Kimberly v. Arms*, 129 U. S. 512, 524, 9 Sup. Ct. R. 355.

⁴ *Fort Dearborn Lodge v. Klein*, 115 Ill. 177, 181, 56 Am. R. 133; *Fish v.*

⁷ *Kimberly v. Arms*, 129 U. S. 512, 524.

Farwell, 160 Ill. 236, 241, 43 N. E. 867.

⁸ *Id.*

⁵ *McCartney v. Calhoun*, 11 Ala.

⁹ *Newcomb v. Wood*, 97 U. S. 581, 583.

¹⁰ *Murrell v. Watson*, 1 Tenn. Ch. 342, 347.

satisfied that the master is right, will re-refer the matter with farther directions. The master cannot go on and state the account upon a different theory. Of the principle controlling the accounting the court must be the judge and not the master.¹ If during the progress of a hearing the master finds himself impeded for the want of sufficient power, he should personally make application to the court to enlarge his authority, or see that it is done by the parties. Upon this subject it is stated by Lord Eldon as follows: "I apprehend it is the duty of the master to go on with the accounts until he finds a difficulty arising from the want of sufficient powers; then an application must be made to the court by himself, or the parties, to do that which is necessary in order to supply the defect of his authority."² In a case where the order of reference provided: "As the case is largely a matter of account, it is ordered that the case be referred to an auditor for determination," it was held that under this order the whole case in the matter of accounting as presented by the pleadings was submitted to the master.³ Where an order of reference is to some extent ambiguous so that a master may have taken either one of two different courses under it, and the lower court approves the course actually taken by the master,—in other words, adopts the construction given to the order by the master,—the upper court will not set such action aside, but will treat the order as if originally drawn in accordance with the views of the court.⁴

An ambiguous order of reference may be amended or corrected at any time on motion, even after the coming in of the report, or it may be corrected by the court *sua sponte*. Mr. Justice Clifford, in speaking of a case in which this was done, says: "The report of the master there was in favor of the complainant; but upon looking at the decretal order when the report came in, the court saw that one of the clauses of the order was quite ambiguous, and, perceiving that its phraseology had escaped the attention of the court at the time, the court of its own motion corrected the decretal order by a new order, recommitted the cause to the master, and the whole subject

¹ *Lupton v. White*, 15 Ves. 432, 436.

² *Mackenzie v. Flannery*, 90 Ga. 590, 598, 16 S. E. 710.

³ *Hoffman's Masters in Chancery*, p. 63, citing *Paynter v. Houston*, 3 Mer. 297, 303.

⁴ *Girard Ins. Co. v. Cooper*, 51 Fed. 832.

was revised and a report brought in greatly more satisfactory to the court."¹ He adds that in another case, "through inadvertence in consequence of the first draft having been lost by counsel after it had been fully examined and settled by the court, a new draft was prepared varying its phraseology; and when that case came back from the master the court . . . corrected, took out the ambiguity from the decretal order, and sent it back to the master. No doubt is entertained of the power of the court in that behalf."²

§ 154. **Waiver of irregularities.**—A party is conclusively presumed to know the character of the order under which a master is acting if he appears and participates in the proceedings. If he intends to object on the ground of an irregularity in the order, or in its procurement, he must do so in apt time. He will not be permitted to proceed with the mental reservation that, if he fails to procure a favorable report from the master, he will raise the objection, but, if favorable, he will stand by it. He will not be permitted to "blow both hot and cold," but must make his election at the proper time. It is a maxim that he who keeps silent when equity requires him to speak will not be heard when equity requires that he should be silent.³ Hence, if an order of reference is irregular, an appearance before the master and participation in the hearing is a waiver of such irregularity.⁴ Such irregularities in an order of reference are waived by an appearance before the master and procuring a report thereunder.⁵ If parties appear before a master and participate in the taking of evidence they are estopped from questioning the authority of the master.⁶ So, too, an irregularity, if any, in making a reference to a commissioner to state an account is waived by a decree rendered after the coming in of the report.⁷

§ 155. **Form of order.**—Every order of reference must be drawn with reference to the issues raised by the pleadings and

¹ *Union Sugar Refinery v. Mathieson*, 8 Cliff. (U. S.) 146, 152, 153, Fed. Cas., 14,398.

² *Id.*

³ *Follansbe v. Kilbreth*, 17 Ill. 522, 65 Am. Dec. 691.

⁴ *Smith v. Frenche*, 28 N. J. Eq. 115; *Wain v. Meira*, 27 N. J. Eq. 77.

⁵ *City of Memphis v. Brown*, 20 Wall. (U. S.) 289, 322; *Gay Manufacturing Co. v. Camp*, 18 C. C. A. 137, 139, 65 Fed. 794.

⁶ *Hawley v. Simons*, 157 Ill. 218, 224, 41 N. E. 616.

⁷ *Tucker v. Hadley*, 52 Miss. 414.

the duties required to be performed by the master; therefore the contents of such orders are as varied as the subjects referred. The following forms are given, which must be varied by the pleader to suit the case in hand:

Order of Reference.

STATE OF ILLINOIS, County of Cook,	} ss.	In the Circuit Court of Cook County. Of the September Term thereof, A. D. 1902.
George W. Stanley		
v.	}	Gen. No. 176,984.
Charles T. Fry and		Term No. 4,628.
Mary S. Fry.		In Chancery.

And now this cause coming on to be heard on motion of complainant's solicitor, and the court being fully advised in the premises, it is ordered, adjudged and decreed that the said cause be and the same is hereby referred to George Mills Rogers, one of the masters in chancery of this court, to take the proofs of the respective parties; that the said master do first give notice to the said parties, respectively, of the time and place when and where such proofs will be taken, and cause to come before him all such witnesses as the respective parties may desire, and do examine them severally under oath and reduce their testimony to writing, and that he forthwith report the same to this court, with all exhibits offered, together with his conclusions as to the law and the evidence.

A reference may be to a master solely for the purpose of obtaining the master's conclusions, both of fact and law, in a case where the evidence is already taken. In a case of this character, the reference being by agreement upon issues made upon a bill and cross-bill, the order of reference may be as follows:

Order of Reference.

Joshua C. Sanders	} Bill.
v.	
Village of Riverside.	} No. 21,878.
Village of Riverside	} Cross-bill.
v.	
Joshua C. Saunders.	

By agreement of parties hereto, it is ordered by the court that the said cause and cross-cause be, and the same are hereby, referred to E. B. Sherman, one of the masters in chancery of

this court, to consider the evidence taken therein, and to report to the court his conclusions of fact and of law.¹

It has already been shown that in cases of accounting correct chancery practice requires that, before a reference is made, there should be a preliminary hearing, in order that the chancellor may ascertain the facts, determine whether the complainant has a right to an accounting, and, if so, fix the basis upon which such accounting shall be had, and give proper directions to the master as to the conduct of the same; and in a subsequent chapter the proper method of conducting such preliminary hearing and the character of the order to be entered are stated,² so the only thing now to be done is to give a form of such an order.

Order of Reference After a Preliminary Hearing.

STATE OF ILLINOIS, }	ss.	In the Circuit Court of Cook County. Of the December Term thereof, 1902.
County of Cook, }		
George W. McClure }	}	Gen. No. 202,404. In Chancery.
v. Henry M. Glover. }		

And now on this day the above cause coming on to be heard, and the court having heard the evidence of witnesses in open court, together with such documentary evidence as was submitted by the parties, and the court having heard the argument of counsel, both on the part of the complainant and the defendant, and being now fully advised in the premises, doth find:

First. That, as alleged in complainant's bill of complaint, on the 12th day of June, 1898, the complainant, George W. McClure, and the defendant, Henry M. Glover, entered into a contract by which the complainant was to furnish to the defendant the sum of \$12,000.00, which sum of \$12,000.00 was, according to the terms of said contract, to be used for the purpose of renting a stock *ranch* in New Mexico, and in the business of raising, buying, shipping and selling sheep and cattle.

Second. The court further finds that, by the terms of said contract, the business aforesaid was to be wholly managed and controlled by the defendant, who was to devote his whole time and attention to the same, and that the net profits thereof were to be equally divided between the complainant and the

¹ Adapted from order entered in above cause in U. S. Circuit Court, N. Dist. Illinois, 118 Fed. 720.

² See *ante*, §§ 124, 127, and *post*,

§§ 293, 294.

defendant, and that the defendant was to keep accurate books of account showing all stock purchased and sold, all expenses incurred in said business, and all profits derived from said business, and was to submit to the complainant, at the end of each and every six months during the existence of said contract, which was to continue for the period of two years from the date thereof, a full, true and accurate account or statement, showing the full details of all such business done during said six months, all cash taken in and all expenses incurred, and all profits derived from said business during said period of six months, which by the terms of said contract were to be equally divided between the complainant and the defendant.

Third. The court further finds that the defendant, on the 20th day of June, 1898, rented a *ranch* in New Mexico and proceeded at once to stock the same by purchasing a large number of cattle and sheep, and for about the period of two years thereafter continued in the business above described.

Fourth. The court further finds that, at the end of the first six months after the date of said contract, to wit: on the 12th day of December, 1898, the defendant submitted to the complainant a statement or account, showing all business transacted up to date, all purchases and sales, and all expenses incurred, which statement was carefully examined by both complainant and defendant, and, after a careful comparison with the books, said statement was agreed by both parties to be correct, and that said statement showed the net profits to date thereof to be \$2,460.00, one-half of which, by the terms of said contract, belonged to the complainant, but no part thereof has ever been paid, and that the defendant has persistently, from that time forward, neglected and refused to render to the complainant any statement or account of said business, or the profits thereof; that, in the month of June, 1900, the defendant abandoned said *ranch*, the lease thereof having expired, sold or otherwise disposed of all stock then on hand, and refuses to render to the complainant any statement or account of said business from and after December 12, 1898.

Fifth. From the foregoing facts the court further finds that the complainant is entitled to an accounting of and from the defendant in regard to the matters aforesaid as set out in complainant's bill.

It is therefore ordered, that this cause be and the same is hereby referred to Horatio L. Wait, one of the masters in chancery of this court, to take and state an account of all dealings and matters above as set forth in complainant's bill, and the master is hereby directed to take and state an account between the complainant and defendant of all dealings and matters above, as set forth in the pleadings, and in taking said account the master is to begin the taking thereof on the 12th day of December, 1898, by charging the defendant with \$1,230,

being the amount found due the complainant by the account stated of that date; and for the better taking of the said account the parties are directed to produce before the said master, upon oath or affirmation, all deeds or books, papers, documents and writings in their custody or power relating thereto, and the parties are to be examined upon oath in relation thereto as the master shall direct; and said master is also to have power to examine other witnesses in relation to said account; and in taking said account he is to make to both parties all just allowances; and is to report what, upon such accounting, appears to be due from each party to the other; and also the balance which, upon the said accounting, shall appear to be due from either party to the other. And the said master is further directed to make his report touching the matters hereby referred to him, together with his conclusions both of law and of fact, with all convenient speed.¹

§ 156. Form of order — Continued.— Upon the filing of a creditor's bill and the appointment of a receiver a difficulty is sometimes encountered in the discovery and obtaining possession of the defendant's assets. In such a case it is usual to obtain an order of court requiring the defendant to appear before a master and submit to an examination. As this subject is fully treated in a subsequent chapter,² it is only necessary here to give the following forms of such orders:

Order for Examination of Debtor as to Assets.

STATE OF ILLINOIS, } In the Circuit Court of Cook County.
County of Cook, } ss. Of the December term thereof, A. D.
1899.

Merchants National Bank }
v. } Gen. No. 195,945.
John A. Morton et al. } In Chancery.

This day came the complainant by its solicitors, and on notice having been duly served on all the solicitors of record and upon the defendant, John A. Morton,

¹ As to form of order of reference generally, see *March v. Eastern R. R. Co.*, 43 N. H. 515, 534, 535; *Pingree v. Coffin*, 12 Gray, 288, 312; *Simmons v. Jacobs*, 52 Me. 147, 153; 3 *Daniell*, Ch. Pr. (6th ed.) 1221. For sample of order, with special directions to master, in cases of accounting, see *Consequa v. Fanning*, 3 Johns. Ch. 587, 590; *Whitenack v. Noe*, 11 N. J. Eq. 321, 330. And for form of interlocutory order in patent case, see *Coburn v. Schroeder*, 19 Blatchf. 493, 8 Fed. 521; and for form of order of reference to master under a petition for temporary alimony and separate maintenance by a wife living separate and apart from her husband without her fault, see *Harding v. Harding*, 180 Ill. 481, 491, 54 N. E. 587.

² *Post*, §§ 258 et seq.

It is ordered that this cause be referred to Edward A. Dicker, one of the masters in chancery of this court, to examine the said defendant, John A. Morton, and such witnesses as shall be produced before said master in chancery, under oath, concerning the property, chattels, things in action, equitable interests and effects of said defendant, John A. Morton, and to report the same to this court with all convenient speed, and that said defendant, John A. Morton, do appear and attend from time to time when summoned or required so to do, and submit to such examination as the said master shall direct in relation to any matter which he may be lawfully required to disclose.

J. GIBBONS, Judge.

It will be noticed that the essential parts of the foregoing order are as follows:

First. A reference of the cause to the master, naming him.

Second. Directions to the master as to the duty required of him.

Third. Ordering the defendant to appear before the master and submit to an examination.

Fourth. A direction to the master to report the result of such examination to the court.

In addition to the foregoing the order usually empowers the master with authority to compel the defendant to produce all books, papers and documents in his possession bearing on the question submitted, and also a direction that the defendant shall transfer to the receiver, under the direction of the master, all his effects in his possession, or under his power or control, except such as are exempt by law.

Under the form of order given above, the master reports the result of his examination to the court that further action may be taken, but under the form given below it would seem no such report is necessary unless the defendant stands in defiance of the authority of the master by refusing to make full disclosure as to his assets, or by refusing to assign, transfer and deliver his assets to the receiver under the direction of the master.

In a recent Illinois case the court ordered the defendant to appear before a master and, under oath, assign and transfer his property to a receiver appointed under a creditor's bill, and also submit to an examination in the master's office touching his effects. The defendant stood in defiance of this order, for which the court adjudged him guilty of contempt. From this

judgment the defendant appealed to the appellate court and from there to the supreme court. Such appeal presented the direct question as to the validity of the order, that is the power of the court to compel obedience to the order as entered. Both of the upper courts affirmed the action of the court below, thus sustaining the validity of the order. This order was as follows:

Order for Examination of Debtor as to Assets.

Aaron Feltenstein }
v. } Gen. No. 95,347.
Jacob Berkson et al. }

(After the first part of the order appointing the receiver it reads as follows:)

And it is further ordered, that the defendant, Jacob Berkson, do appear before I. K. Boyeson, a master in chancery of this court, forthwith, and assign, transfer and deliver to said receiver, on oath, under the direction of the master in chancery, all such property, real and personal, things in action, equitable interests and other effects, except as aforesaid, property exempt by law from execution and trust property where the trust has been created by or the trust fund proceeded from some person in good faith, other than said Jacob Berkson himself; and that he deliver to said receiver in like manner all bills, notes, contracts, books of accounts, vouchers, documents and any other evidences in writing or documentary matter relating thereto and to the business of said Jacob Berkson, and that the said defendant, Jacob Berkson, execute and deliver to said receiver, under the direction of the said master, a general assignment of said property and effects, and also execute, acknowledge and deliver to said receiver, under the direction of said master, the conveyance and assignment of the real estate mentioned in said bill and hereinbefore described, and all the rents, issues and profits thereof, and that said Jacob Berkson and his tenants attorn to said receiver and pay to him the rents and profits.

And it is further ordered that the said defendants herein, and each of them, appear before said master in chancery forthwith, and at such time and times and places as said master shall direct, and submit to an examination as said master shall direct, in relation to the property of said Jacob Berkson or situation and disposition thereof, and to any matter which he may be lawfully required to disclose, and produce at such examination all papers, accounts, documents and vouchers of any kind or character relating to the business of said Jacob Berkson, and his property, direct or indirect, concerning which

he is to be examined under the direction of said master, as aforesaid.¹

One of the assignments of error questioned the validity of the above order on the ground that it did not require the master to report the evidence or his conclusions thereon. Upon this point the appellate court held that as the defendant filed objections with the master to his report, which objections were converted into exceptions upon the coming in of the report, which were wholly confined to controverting the master's findings of fact, it was too late to urge the objection for the first time in the appellate court. The point was not noticed by the supreme court.²

§ 157. **Order — Whether final or interlocutory.**—Decrees are divided into interlocutory and final. Ordinarily it is easy to determine to which class a particular decree belongs, but now and then a case arises where the task is more difficult. The question usually arises upon appeals from decrees claimed to be interlocutory, but it occasionally happens that the power of the court to set aside such a decree at a subsequent term is the subject of dispute.³ A decree referring a cause to a master may be either final or interlocutory according to the duties required of the master under it. It is clear that a decree finding the amount due and referring it to the master to execute it by making a sale of the premises is final. Such is the case in the foreclosure of a mortgage.⁴ But if the decree is for the sale of the property, leaving the amount due to be subsequently ascertained by the court, it is not final.⁵ So if the decree merely determines the validity of an instrument, such as a mortgage, and directs the cause to stand continued until the coming in of the master's report, it is interlocutory and not final.⁶ It is

¹ Berkson v. People, 51 Ill. App. 102, 154 Ill. 81. Order copied from record of circuit court, Cook county.

² For forms of transfers of assets to a receiver, under an order of court, see *post*, § 272.

³ McGourkey v. Toledo & Ohio Ry., 146 U. S. 536, 545, 13 Sup. Ct. R. 170.

⁴ Ray v. Law, 3 Cranch, 179; Whiting v. Bank of the United States, 13 Pet. 6, 15; Beebe v. Russell, 19 How. (U. S.) 283; Bronson v. Railroad Co.,

2 Black (U. S.), 524, 530; McGourkey v. Toledo & Ohio Ry., 146 U. S. 536, 547, 13 Sup. Ct. R. 170.

⁵ Railroad Co. v. Swasey, 23 Wall. 405, 409; Grant v. Phoenix Ins. Co., 106 U. S. 429, 430, 1 Sup. Ct. R. 414; Bostwick v. Brinkerhoff, 106 U. S. 3, 1 Sup. Ct. R. 15; McGourkey v. Toledo & Ohio Ry., 146 U. S. 536, 545, 13 Sup. Ct. R. 170.

⁶ Burlington, Cedar Rapids, etc. Ry. v. Simmons, 123 U. S. 52, 55, 8 Sup.

equally well settled that a decree in admiralty determining the liability for a collision or other tort,¹ or in equity establishing the validity of a patent and referring the case to a master to compute and report the damages, is interlocutory only.²

On examination of the cases cited in support of the foregoing statements we may safely state that where the court makes a decree fixing the rights and liabilities of the parties, and thereupon refers the case to a master for a ministerial purpose only, and no further proceedings are to be had in court except the approval of the master's report, the decree is final; but if the court, by its decree, refers a case to a master as a subordinate court and for a judicial purpose, such as to ascertain the amount due upon a mortgage, or to state an account between the parties, upon which, upon the coming in of the master's report, a further decree is to be entered, the decree is not final.³ But even if an account be ordered taken, if such accounting be not asked for in the bill, and be ordered simply in execution of the decree, and such decree be final as to all matters within the pleadings, it will still be regarded as final.⁴

§ 158. Order—When may be altered, modified or set aside.—It is a well recognized rule that all orders of reference and all other interlocutory orders are open for review or modification and may be set aside at any time before the final decree is entered.⁵ Even after the entry of a final decree, it, as well as all previous interlocutory orders, are said to be “in the

Ct. R. 58; *Parsons v. Robinson*, 122 U. S. 112, 114, 7 Sup. Ct. R. 1153; *Mills v. Hoag*, 7 Paige, 18, 31 Am. Dec. 271; *McGourkey v. Toledo & Ohio Ry.*, 146 U. S. 536, 545, 13 Sup. Ct. R. 170.

¹*The Palmyra*, 10 Wheat. 502; *Chace v. Vasquez*, 11 Wheat. 429; *Mordecai v. Lindsay*, 19 How. (U. S.) 199.

²*Barnard v. Gibson*, 7 How. (U. S.) 650, 655; *Humiston v. Stainthorp*, 2 Wall. 106; *McGourkey v. Toledo & Ohio Ry.*, 146 U. S. 536, 545, 13 Sup. Ct. R. 170.

³*Craighead v. Wilson*, 18 How. (U. S.) 199; *Beebe v. Russell*, 19

How. 283; *McGourkey v. Toledo & Ohio Ry.*, 146 U. S. 536, 545, 13 Sup. Ct. R. 170.

⁴*McGourkey v. Toledo & Ohio Ry.*, 146 U. S. 536, 546, 13 Sup. Ct. R. 170; *Craighead v. Wilson*, 18 How. (U. S.) 199; *Winthrop Iron Co. v. Meeker*, 109 U. S. 180, 3 Sup. Ct. R. 111.

⁵*Shaw v. Patterson*, 2 Tenn. Ch. 171, 174; *Hawkins v. Taber*, 47 Ill. 459, 461; *Gibson v. Rees*, 50 Ill. 383, 410; *Jeffery v. Robbins*, 167 Ill. 375, 387, 47 N. E. 725; *Quinn v. McMahan*, 40 Ill. App. 593, 601; *Fourniquet v. Perkins*, 16 How. (U. S.) 82, 86; *Consequa v. Fanning*, 3 Johns. Ch. 864.

breast of the court" until the last day of the term, and until that time may be modified, altered or set aside as justice may require. "It is a general rule of law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are entered of record, and they may be then set aside, vacated, modified or annulled by that court."¹

Not only is it within the power of the chancellor to thus modify, alter or set aside previous orders, but it is his duty, whenever he "becomes satisfied that he has committed an error, to avail himself of the earliest opportunity to correct it, and not delay justice by binding a party to his appeal or writ of error."² Such orders, when ascertained to be erroneous or an impediment to further rightful proceedings, may and ought to be amended, modified, or set aside, as the right of the case may require, either upon direct and summary proceedings instituted for that purpose, or by the court upon its own motion.³

All interlocutory orders are in the breast of the court and under its control until the final disposition of the cause; hence upon the coming in of the master's report, if the court should be satisfied that there is no equity on the face of the bill, the order of reference should be set aside and the bill dismissed,⁴ or amended, as justice may require.⁵ It is only after the

¹ *Bronson v. Schulten*, 104 U. S. 410, 415; *People v. Whitson*, 74 Ill. 20, 22-24; *The State v. Harrison*, 10 Yerg. (Tenn.) 542, 546; *Nowland v. Glenn*, 2 Md. Ch. 368; *Burch v. Scott*, 1 Bland (Md.), 112; *Fraker v. Brazelton*, 12 Lea (Tenn.), 278, 280, 281; *Doss v. Tyack*, 14 How. (U. S.) 297, 313; *Barrell v. Tilton*, 119 U. S. 637, 643, 7 Sup. Ct. R. 832; *Henderson v. Carbon, Coal & Coke Co.*, 140 U. S. 25, 40, 11 Sup. Ct. R. 691.

² *Gibson v. Rees*, 50 Ill. 383, 410; *Fort Dearborn Lodge v. Klein*, 115 Ill. 177, 181, 3 N. E. 272, 56 Am. R. 133; *Fish v. Farwell*, 160 Ill. 236, 241, 43 N. E. 367; *Jeffery v. Robbins*, 167 Ill. 375, 387, 47 N. E. 725; *Fourni-*

quet v. Perkins, 16 How. (U. S.) 82, 86.

³ *Ryon v. Thomas*, 104 Ind. 59, 68. As to the right and duty of the chancellor to set aside or modify such orders upon his own motion, see also *Calk v. Stribling*, 1 Bibb (Ky.), 122, 124, 125; *Cook v. Bay*, 4 How. (Miss.) 485, 505; *Fort Dearborn Lodge v. Klein*, 115 Ill. 177, 181, 3 N. E. 272, 56 Am. R. 133; *Fish v. Farwell*, 160 Ill. 236, 241, 43 N. E. 367.

⁴ *Gibson v. Rees*, 50 Ill. 383, 410; *Fourniquet v. Perkins*, 16 How. (U. S.) 82, 86.

⁵ *Lang v. Brown*, 21 Ala. 179, 56 Am. Dec. 244, 249.

entry of a final order that it is beyond the power of the court to alter, modify or set aside at a subsequent term. As to all interlocutory orders, the court has the power to modify, vacate or set them aside, as justice may require.¹

While it is true that an interlocutory decree is "in the breast of the court," and may be set aside at any time until the case is finally disposed of, yet the court will not permit a party to speculate on his chances, and, having obtained an adverse report from the master, then back out. Thus after a cause has been referred to the master, a hearing had before him, and a decision made in favor of the defendant and adverse to the complainant, the court will not, on motion of the latter, dismiss the bill without prejudice; and especially is this true if the reference to the master is "to hear the parties, report the facts, and his rulings on any questions of law arising in the case." Neither party can, at his pleasure, revoke or rescind the reference so made.²

§ 159. Order — Source of master's authority.—It is frequently but not very accurately said that the order of reference is the entire basis of the master's authority.³ Mr. Justice Cutting, speaking for the supreme court of Maine, says: "In this state we have no '*Regulus Generalis*' in relation to the duties of masters in chancery; but in each case where a master is appointed, the rule for his guidance is the decretal order."⁴ It is far more accurate to say that "the master's authority, as to the subjects and extent of his examination and report, is limited and controlled by the order of reference."⁵ The mas-

¹ Campbell v. Powers, 139 Ill. 128, 135, 28 N. E. 1062; Hayes v. Caldwell, 5 Gilm. (Ill.) 33; Gage v. Rohrbach, 56 Ill. 262; March v. Meyers, 85 Ill. 177; Fort Dearborn Lodge v. Klein, 115 Ill. 177, 3 N. E. 272, 56 Am. R. 133.

² Am. Bell Tel. Co. v. Western Union Tel. Co., 16 C. C. A. 367, 69 Fed. 666, 670.

³ Simmons v. Jacobs, 52 Me. 153; Gordon v. Hobart, 2 Story, 243, 260, Fed. Cas. 5,608; Stonington Savings Bank v. Davis, 15 N. J. Eq. 31, 32; Remsen v. Remsen, 2 Johns. Ch. 495, 501; Kay v. Fowler, 7 Monroe, 593; Harris

v. Fly, 7 Paige, 421; Torrey v. Shaw, 8 Edw. Ch. 356; Updike v. Doyle, 7 R. I. 446, 458; Rishton v. Grissell, L. R. 5 Eq. 326; Blackford v. Davis, L. R. 4 Ch. 304; Field v. Holland, 6 Cranch, 8, 25, 26; Dubourg v. United States, 7 Peters, 625; Hudson v. Trenton Locomotive & Machine Mfg. Co., 16 N. J. Eq. 475; Izard v. Bodine (1 Stockt.), 9 N. J. Eq. 309; Jacobus v. Smith, 14 Ill. 359.

⁴ Simmons v. Jacobs, 52 Me. 147, 153.

⁵ Stonington Savings Bank v. Davis, 15 N. J. Eq. 30; Gordon v. Hobart, 2 Story, 243, 260, Fed. Cas. 5,608;

Master's authority as to the subject-matter to be investigated, it is true, is limited by the order of reference, but he almost invariably exercises authority in the discharge of his duty not delegated to him by the order of reference. This authority may be derived from the statute, a rule or rules of court, or by the general principles of law governing the practice in such cases. For example, United States Equity Rule No 77 provides that the master shall regulate all the proceedings before him upon every reference, and gives to him full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference, and also to require the production of all books and papers applicable thereto, and also to examine on oath, *viva voce*, all witnesses produced by the parties. These powers are applicable to every reference precisely as if embodied in the order of reference in each particular case.

§ 160. **Order — Must be obeyed.**— A master must, where the court charges him with the performance of a duty, not only obey the directions imposed upon him by the order of reference, but also all the duties imposed upon him by law in the particular case. He is an officer of the court, and, in case of any failure or refusal to discharge such duty, he may, by a summary proceeding, be compelled to act. As such officer of the court he is always present in court and subject to summary proceedings before the chancellor on failure to discharge his duties as such. *Mandamus* is not the proper remedy.¹ He has no right to review, reject, or disregard the decision, order, or directions of the court contained in the decretal order under which they are appointed. Instead of that he is bound to obey, follow, and carry into effect all such decisions, orders, and directions.² He has no power to find against matters determined in the interlocutory order of reference.³ The master is but a ministerial officer of the court, and as such cannot depart from or disobey the plain directions of the decretal order.

Remsen v. Remsen, 2 Johns. Ch. 501; Shriver, 115 Ill. 530, 540, 5 N. E. Harris v. Fly, 7 Paige, 421; Torrey v. 87.
Shaw, 3 Edwards' Ch. 356; Morris v. ¹ People v. Bowman, 181 Ill. 421, 423, 55 N. E. 148.
Taylor, 23 N. J. Eq. 131; Lonsdale ² Felch v. Hooper, 4 Cliff. (U. S.)
Co. v. Moues, 2 Cliff. 538; Farmers' 489, 494, Fed. Cas. 4,718.
L. & T. Co. v. Central R. R., 2 Fed. ³ Mulford v. Williams, 8 N. J. Eq.
656, 1 McCrary, 332; Fordyce v. 536; Beach, Eq. Pr., sec. 685.

He cannot substitute his own judgment for that of the court.¹ Any departure from the directions of the court in the order of reference is error.²

Where the order of reference specifies the time to begin taking testimony before the master and also the time for closing proofs, it confers upon the master no discretion to extend the time beyond the day named in the order.³ So, too, a party is not permitted to indirectly assail the order of reference by exceptions to a master's report. If he is dissatisfied with the order of reference he must appeal, or apply for a rehearing.⁴ Not only must the order of reference be obeyed, but the rulings of the court accompanying the order of reference cannot be regarded in any other light than express directions to the master to guide him in taking the account. He is not at liberty to disregard or act in opposition to them in stating the account under the order of reference, especially after they have been passed upon by the appellate court, and their correctness sanctioned.⁵ Though the order of reference is clearly written and inconsistent with an opinion of the chancellor, yet the master cannot ignore the terms of the order. In such a case it is his duty to follow the decree and not the opinion.⁶

§ 161. **Order — Master must not usurp power of the court.** — Any attempt on the part of the master to interfere with the prerogative of the court is improper and will be disregarded by the court when called to pass upon the question. In a case, for example, of a simple reference to state an account, all equities are reserved until the coming in of the master's report, and a recommendation upon the part of the master to dismiss the bill for want of equity will be disregarded by the court, as that question is not only not included in the order of reference, but is not a proper subject of reference. As until the final disposition of the cause all orders are

¹Partlow v. Moore, 184 Ill. 119, 122, 56 N. E. 317.

²Felch v. Hooper, 4 Cliff. C. Ct. 480, 494, Fed. Cas. 4,718; Fenwick v. Gibbs, 2 Desauss. 629; Maury v. Lewis, 10 Yerg. (Tenn.) 115, 119.

³Belmont Mining Co. v. Costigan, 21 Col. 471, 42 Pac. 647.

⁴Clark v. Willoughby, 1 Barb. Ch. 68; Myers v. James, 4 Lea, 370, 372; Beach, Eq. Pr., sec. 701, note 5.

⁵Brown v. Lang, 14 Ala. 179; Lang v. Brown, 21 Ala. 244, 247.

⁶Taylor v. Kilgore, 38 Ala. 214, 228.

"still in the breast of the court," the chancellor may, even after the coming in of the master's report, dismiss the bill for want of equity, yet in so doing he will be governed by his own opinion uninfluenced by any recommendation of the master.¹ Yet in a case in North Carolina where the court sustained the exceptions to the master's report, set the report aside and dismissed the bill, it was held to be error.²

A motion by a defendant to dismiss a suit for want of jurisdiction, made before a master to whom the case has been referred to "find and report the facts," raises no question whatever. The question of jurisdiction is one for the chancellor alone and must be raised by an appropriate plea or motion made in court. The master has nothing to do with the jurisdictional question. It is his duty to find and report the facts, together with his conclusions, when ordered so to do, and, after his report is returned into court the defendant may then, if he sees fit so to do, enter a motion to dismiss predicated upon the report.³ So too, an application to the master for leave to amend an answer, so as to set up a defense not previously relied upon, can avail the defendant nothing. Leave to amend the pleadings must be obtained by application direct to the court.

Upon a reference to assess the damages, in a case for infringement of a patent, the master is bound by the decree, and is not at liberty to question the right of the plaintiff to recover. He cannot review the decree nor inquire into the prior state of the art, but his inquiry must be limited to the object of the reference.⁴ The master to whom a case has been referred to take testimony upon the merits has no authority to pass upon a temporary injunction previously granted therein.⁵ So, under an order of reference, a master has no power to pass upon jurisdictional questions.⁶

Upon a reference the master has no power to pass upon a demurrer to the pleadings or to permit amendments thereof. If

¹ *Blauvelt v. Ackerman*, 20 N. J. Eq. 141, 143.

² *Hays v. Hays*, 64 N. C. 59.

³ *Smith v. Rock*, 59 Vt. 232, 235, 9 Atl. 551.

⁴ *Hoe v. Scott* (U. S. Cir. Ct. D. N. J.), 87 Fed. 220.

⁵ *Thompson v. Brown*, 48 S. C. 350, 28 S. E. 655.

⁶ *Smith v. Rock*, 59 Vt. 232, 9 Atl. 551.

the pleadings are insufficient the proper practice is for the parties to demur or except, and have the question passed upon by the judge before reference is made.¹ Referees and masters have no power to change the pleadings upon a reference made to them, but, when an issue is made up and sent to them for a hearing, "they must pass on that issue and not change it."²

§ 162. **Master must not exceed authority.**— Not only must a master not usurp authority which belongs exclusively to the court, and which the court has no power to delegate to him, but he must be just as careful not to go beyond the limits of the order of reference by doing that which the court might have authorized him to do. For example, where the testimony in a cause is already taken and the court refers it to a master "to state the facts," the master can only report his conclusions upon such testimony. He is not at liberty, under such an order, to take further testimony. If either party desires to take additional testimony he must apply to the court for an order, directing the master to hear the same.³

Where a reference was made to the master as to the title, and he reported that A. B. with the concurrence of C. D., etc., could make a good title, the master of the rolls intimated an opinion that the master had exceeded his authority, having reported upon the conveyance instead of the title, and though the report was not excepted to, but confirmed, still it must be considered as a nullity.⁴ If a master is appointed to examine the books and papers of a concern in order to ascertain whether a party is liable to account or not, he is not authorized to state an account between the parties, and if he does so his action in that regard is a nullity.⁵ So, too, under a reference to ascertain and report the amount due to the mortgagee and prior incumbrancers, the master has no authority to inquire and report upon the question of priority, and if he does so his findings to that extent will "be laid entirely out of the question" in deciding upon the parties' rights upon the bill and answers,

¹ *Ayers v. Daly*, 56 Ga. 119, 125;

White v. Reviere, 57 Ga. 386; *Per-*

severance Mining Co. v. Bisaner, 87

Ga. 193, 196, 13 S. E. 461.

² *De la Riva v. Berreyesa*, 2 Cal. 195.

³ *Burton v. Peterson*, 4 W. N. C. 526.

⁴ *Lewis v. Loxam*, 1 Men 179, cited

⁵ 2 Mad. Ch. 683.

⁶ *White v. Walker*, 5 Fla. 478, 486.

and in such case the master's report was confirmed except as to such unauthorized findings.¹

§ 163. **Effect of exceeding authority.**—The master has absolutely no authority to pass upon matters not submitted to him by the order of reference, and if he takes testimony upon matters outside of such order exceptions may be sustained to the same, or it may be treated as surplusage.² His authority is limited and controlled, as to the subjects and extent of his examination and report, by the order of reference, and, so far as he goes beyond the directions given him in the order of reference, his action will be disregarded.³ His power in a particular case is derived from the order of reference, and cannot be enlarged or diminished by consent of parties; yet, if the master exceed his powers, by taking and reporting testimony upon questions not referred to him, the court may, upon the coming in of his report, make its own findings upon the evidence so reported.⁴ "No report shall be respected in court which exceedeth the warrant of reference."⁵ If he goes beyond the reference his report, so far as it relates to such matters, is a nullity.⁶

Where the master takes evidence and reports upon a matter not authorized by the order of reference, his action must be wholly disregarded in passing upon the real questions involved.⁷ Where a matter is in no sense in issue between the parties the court itself, even by consent of parties, should not attempt to adjudicate upon it, as where an order of reference confers no authority upon a master to investigate and report upon a given subject, consent of parties cannot confer it. Judge Story says: The consent of parties could not confer upon him any authority to examine into matters *dehors* his commission; and if he does so his action and the whole proceedings based on his report, in this regard, will be irregular, and *coram non judice*.

¹ Harris v. Fly, 7 Paige, 421.

² McMahon v. Paris, 87 Ga. 660, 662, 13 S. E. 572.

³ Stonington Savings Bank v. Davis, 15 N. J. Eq. 80.

⁴ Best v. Pike, 98 Wis. 408, 67 N. W. 697.

⁵ Lord Bacon's Order No. 28, Jan-

uary 29, 1618; Beames' Orders, p. 23.

⁶ White v. Walker, 5 Fla. 478, 486; Gordon v. Hobart, 2 Story, 243, 260, Fed. Cas. 5,698; Levert v. Redwood, 9 Porter (Ala.), 79, 94; Harris v. Fly, 7 Paige, 421; 2 Daniell, Ch. Pr. (4th ed.) 1296.

⁷ Harris v. Fly, 7 Paige, 421, 424.

Such parts of his report as relate to matters upon which he had no authority to act "must be struck out of the report."¹ Yet it is said in two Illinois cases that, although a matter passed upon by the master is not embraced within the order of reference, yet if it is voluntarily submitted to him by both parties, and both treat it as a matter upon which the master is to act, and no objections are made in the trial court, it is too late to raise the question in the upper court.²

II. THE PLEADINGS.

§ 164. Master's authority—The pleadings.—What is submitted to the master and what the extent of his authority in a matter referred to him depends absolutely on the pleadings and the order of reference. Under a general order of reference all issues raised by the pleadings are submitted to the master, but beyond these he cannot go unless by special directions of the court;³ in other words, the authority of the master, in a particular case, is limited by the order of reference and the issues raised by the pleadings;⁴ that is, the power of the master is construed with reference to the pleadings.⁵ A reference will not authorize a report more extensive than the allegations and proofs will warrant.⁶ Chancellor Kent says: "I take it for granted that an order for a reference must be founded upon the pleadings and proofs, and that it cannot be made more extensive than the *allegata* and the *probata* of the parties."⁷

The master, therefore, to determine the extent of his author-

¹ Gordon v. Hobart, 2 Story, 243, 260, Fed. Cas. 5,608.

² Gehrke v. Gehrke, 190 Ill. 166, 175, 60 N. E. 59; Thornton v. Commonwealth Loan Ass'n, 181 Ill. 456, 459, 54 N. E. 1037.

³ Wyckoff, Ex'r, v. Combs, 28 N. J. Eq. 40; Stonington Sav. Bank v. Davis, 2 McCart. 30, 31; Gordon v. Hobart, 2 Story R. 243, 260, Fed. Cas. 5,608.

⁴ Wyckoff, Ex'r, v. Combs, 28 N. J. Eq. 40.

⁵ Potter v. Howe, 141 Mass. 357,

6 N. E. 233; Waterman v. Curtis, 26 Conn. 241, 247; Providence Rubber Co. v. Goodyear, 9 Wall. 788; Brainerd v. Arnold, 27 Conn. 617; Morris v. Mowatt, 4 Paige, 142; Kuhl v. Martin, 28 N. J. Eq. 370; Mackenzie v. Flannery, 90 Ga. 590, 16 S. E. 710; Beach, Eq. Pr., sec. 685, note 2; Murrell v. Watson, 1 Tenn. Ch. 342.

⁶ Consequa v. Fanning, 3 Johns. Ch. 587, 595; Leverts v. Redwood, 7 Porter (Ala.), 79, 94.

⁷ Consequa v. Fanning, 3 Johns. Ch. 587, 595.

ity, must look to the pleadings as well as to the order of reference. A master, for example, has no power to take testimony in support of a defense not set up in the answer. "The master cannot inquire into the validity of a defense not set up in the answer, any more than he can inquire into usury or fraud in the consideration, in a cause wherein the only defense set up is infancy;"¹ or, take the following example: A bill was filed for a partnership accounting and was silent as to any settlement, but the answer set up a settlement at a certain time and stated an account from that date. Upon this state of the pleadings a reference was taken to the master to state the accounts. The solicitor for the complainant contended that the master should state the account from the beginning of the partnership, while the solicitor for the defendant insisted that the master should begin at the date of the settlement. The court sustained the contention of the latter, holding that, under the pleadings, the master had no power to disregard the settlement.²

Under the Virginia code it is not uncommon practice for the order of reference, after specifying the particular matter into which the commissioner is to inquire and upon which he is to make his report, to add, "and any such other matters pertaining to this inquiry as any party may desire."³ But it is understood that this does not warrant the master in going beyond matters pertinent to the issues as raised by the pleadings.⁴

§ 165. Allegations of fact.—In the examination of the order of reference as construed in the light of the pleadings for the purpose of determining the extent or limit of his authority, the master must constantly keep in mind that it is not in his power, or in that of the court, to give a party the benefit of a defense not set up in his answer. The court can only pronounce judgment on the issues presented by the pleadings.⁵ The court cannot lay hold of any matter not properly put in issue on the ground that public policy and public morals require it.⁶ Even though a defense arises after the filing of de-

¹ *Morris v. Taylor*, 23 N. J. Eq. 131, 133.

² *Merselis v. Ex'rs of Merselis*, 7 N. J. Eq. 557.

³ Code 1873, ch. 128, sec. 26; 2 Barton's Ch. Pr., p. 644.

⁴ 2 Daniell, Ch. Pr., p. 1296, note.

⁵ *Fuller v. Fuller*, 41 N. J. Eq. 198.

201, 3 Atl. 409.

⁶ *Jones v. Jones*, 18 N. J. Eq. 83, 90

Am. Dec. 607.

fendant's answer, such as the commission of adultery by complainant in a divorce suit after defendant's answer, still the court cannot grant any relief on that account unless the defendant sets it up by an amended answer.¹ The whole thing, stated in a nut-shell, is this: The court, or master, cannot act on distinct ground for relief made out by the proofs unless such ground of relief is set up and claimed by the pleading.² To this end the rules of equity pleading require the complainant to state the *facts* upon which his claim rests with such fullness and certainty as will give the defendant clear information of the case he is called upon to answer.³ This rule applies, however, only to the principal facts necessary to be established to maintain the complainant's bill or defendant's answer, and does not require a party to state evidentiary facts which are to be offered only in support of or to establish the main fact. The pleader is not bound to set forth all the minute facts, but on the contrary a general statement of a precise fact is often sufficient, and the circumstances which merely go to confirm or establish it need not be minutely charged, but are matters of evidence.⁴

§ 166. **Conclusions — Opinions.**—In determining the extent of his authority by the examination of the pleadings the master must also constantly keep before him the fact that there is a vast difference between material allegations of fact and the mere conclusions or opinions of the pleader. This setting out of conclusions or opinions of the pleader instead of stating facts is just as objectionable in chancery pleading as at common law. It is a too common error for the pleader to give his own conclusion or opinion without giving the facts on which it is founded. This amounts to nothing at all as a pleading. The rights of the parties in every litigation must be adjudged according to the *facts* of the case, as they shall be made to appear; and in order that the court may ascertain

¹ Fuller v. Fuller, *supra*.

² Plume v. Small, 5 N. J. Eq. 460.

³ Arnett v. Welch's Ex'rs, 46 N. J. Eq. 543, 547, 20 Atl. 48; Mutual Life Ins. Co. v. Sturges, 33 N. J. Eq. 328, 336; Houghton v. Reynolds, 2 Hare, 264, and the authorities collected in

the valuable note to this case: and see, also, 1 Dan. Ch. Pr. 373.

⁴ Chicot v. Lequesne, 2 Ves. Sr. 314, 318; Clark v. Periam, 2 Atk. 337; Faulder v. Stuart, 11 Ves. 296, 302; Colton v. Ross, 2 Paige, 396; Lloyd v. Brewster, 4 Paige, 537, 27 Am. Dec. 88.

what they are, it is necessary that they should be plainly and distinctly alleged by one party, and either admitted or denied by the other.¹ The crying evil of the master's office is the piling up of great masses of evidence upon immaterial matters. Under the constant ruling: "Let it go in subject to objection," hundreds of pages of evidence are returned into the court which are not only useless but worse than useless, for piles of such rubbish must be explored in order to sift out that which is material and of service, and, not infrequently, the real matters in issue are obscured or entirely lost sight of by court and counsel. The pleadings, if properly drawn, disclose at once what is material. If evidence is not admissible under the issues as made the master should promptly say so, so that counsel can, if it is deemed important and the interest of justice demands it, appeal at once to the chancellor to allow such amendment to the pleadings as to permit its introduction.² Testimony upon matters not in issue by the pleadings, followed by action thereon by the master and the court, settles nothing. The principle is authoritatively settled that a decree or judgment, on a matter outside of the issue raised by the pleadings, is a nullity, and is nowhere entitled to the least respect as a judicial sentence.³ A decree which is entirely outside of the issue raised by the record is invalid, and will be treated as a nullity, even in a collateral proceeding. A decree or judgment which is not appropriate to any part of the matter in controversy before the court can have no force. The matter in controversy is that exclusively which is presented by the pleadings.⁴ To entitle a plaintiff to offer evidence to establish any fact, either before the chancellor or the master, such fact must be distinctly averred in his bill.⁵ Of course the same rule applies to the defendant as to matters of fact set up as a defense in his answer.⁶

¹ Jones v. Davenport, 45 N. J. Eq. 77, 80, 17 Atl. 570.

² See *post*, §§ 305-311.

³ Jones v. Davenport, 45 N. J. Eq. 77, 81, 17 Atl. 570; Munday v. Vail, 84 N. J. Law, 418.

⁴ Reynolds v. Stockton, 43 N. J. Eq. 211, 10 Atl. 385.

⁵ Irnham v. Child, 1 Bro. Ch. R. 92, 94;

Wilkes v. Rogers, 6 Johns. 566; Watkyns v. Watkyns, 2 Atk. 96; Whaley v. Norton, 1 Vern. 483.

⁶ Watkyns v. Watkyns, 2 Atk. 96. As to the folly of inserting high-sounding phrases in pleadings instead of simply stating the facts relied upon, see *post*, §§ 174-176, 341.

III. RULES OF COURT.

§ 167. Master's authority — Rules of court.—A rule of court is but a general order, applying to a class of cases what the court might order in a particular case. Thus a court may, in any individual case, enter an order for the opening of depositions, or it may by a general order authorize the opening of all depositions on the first day of the term. So the court may in each order of reference arm the master with power to cause the witnesses to appear before him, to examine them *viva voce*, and to compel the production of books, papers and documents, or the court may by a general order vest in him such power under all references, where the same may in his judgment be necessary. The power to make rules regulating the practice, and to expedite the determination of suits and other proceedings, is inherent in every court of record; the limitation being that such rules must be consistent with the constitution and laws of the state.¹ An additional limitation upon this power is, that such rules must be reasonable.²

All reasonable rules not inconsistent with the constitution and laws of the state, governing the procedure of the court, including proceedings in the master's office, have the force and effect of law.³ The reasonable and established rules of

¹Owens v. Ranstead, 22 Ill. 161; Holloway v. Freeman, 22 Ill. 197; Illinois Cent. R. R. Co. v. Haskins, 115 Ill. 800, 802, 2 N. E. 654; Lancaster v. W. & S. W. Ry. Co., 132 Ill. 492, 24 N. E. 629; Vanatta v. Anderson, 8 Binn. 417, 423; Barry v. Randolph, 8 Binn. 277; Fullerton v. Bank of United States, 1 Pet. 604, 618; Jones v. Rittenhouse, 87 Ind. 348, 350; Finegan v. Allen, 46 Ill. App. 553; Attorney-General v. Lum, 2 Wis. 507; In re Road McCandless Tp., 110 Pa. St. 605, 1 Atl. 594. As to extent of power of the supreme court of the United States, and as to the control of the United States circuit court over its own practice, see cases cited in note to Gray v. Chicago, I. & N. R. R. Co., 1 Woolw. C. C. 63, Fed. Cas. 5,718.

²Grosvenor v. Doyle, 50 Ill. App. 47; Larned v. Platt, 26 Ill. App. 278; Owens v. Ranstead, 22 Ill. 161.

³Gaines v. Travis, 1 Abb. Ad. 422, Fed. Cas. 5,130; The Illinois, 1 Brown, Ad. 13, Fed. Cas. 7,003; The Delaware, Olcott, 240, Fed. Cas. 3,762; The Young America, 1 Newb. 107; Ward v. Chamberlain, 2 Black, 430; Pierpont v. Fowle, 2 Woodb. & M. 23, Fed. Cas. 11,152; Gray v. Chicago, I. & N. R. R. Co., 1 Woolw. 63, Fed. Cas. 5,713; The St. Lawrence, 1 Black, 522; The Steam Cutter Co. v. Jones, 18 Fed. 567; Spain v. Thomas, 49 Ill. App. 249; Lancaster v. W. & S. W. Ry. Co., 132 Ill. 492, 24 N. E. 629; Treishel v. McGill, 28 Ill. App. 68, 72.

judicial tribunals become as much a part of the law of the land as the statutes under which they act.¹

§ 168. Rules of court — Continued.—The Federal Judiciary Act of 1789, § 17,² confers power on the federal courts to establish all necessary rules for the regulation of procedure therein. Under inherent power, in some jurisdictions supplemented by statutory authority, chancery courts, in England and in this country, have adopted rules regulating proceedings in the master's office in case of references. These rules extend, limit or define the master's authority, and, as above stated, have the force and effect of law. They, among other things, provide for bringing the decree into the master's office;³ the master's duty in fixing a first meeting "to consider the decree;"⁴ the master's duty in fixing time and place of hearing;⁵ notice to party, or counsel, of meetings in the master's office;⁶ regulation of proceedings in the master's office on the hearing of a reference;⁷ the method of compelling the attendance of witnesses;⁸ the method of compelling the production of books and papers to be used as evidence;⁹ the method of examination of parties, creditors and witnesses;¹⁰ the power to employ a stenographer to take down the testimony of the witnesses;¹¹ the method of accounting before the master;¹² the preparation of a draft report, service of copies on solicitors, and objections thereto;¹³ the preparation of the master's report, what it shall and what it shall not contain, and the time in which it must be

¹ *Germania Iron Co. v. James*, 61 U. S. App. 1; *Rout v. Ninde*, 111 Ind. 597, 18 N. E. 107; *Moulder v. Kempff*, 115 Ind. 459, 17 N. E. 906; *Rencher v. Anderson*, 93 N. C. 105; *Barnes v. Easton*, 98 N. C. 116, 3 S. E. 744.

² U. S. Rev. Stat., §§ 917, 918.

³ Eng. Ch. Orders, 1828, Nos. 50, 51; N. Y. Ch. Rules, Nos. 100, 101; U. S. Eq. Rule, No. 74.

⁴ Eng. Ch. Order, 1828, No. 50; N. Y. Ch. Rules, No. 102; N. J. Ch. Rules, Nos. 194, 201, 202.

⁵ Eng. Ch. Order, 1828, No. 50; N. Y. Ch. Rule, No. 100; U. S. Eq. Rule, No. 75; N. J. Ch. Rules, Nos. 43, 195, 201, 202.

⁶ Eng. Ch. Order, 1828, No. 50; N.

Y. Ch. Rule, No. 100; U. S. Eq. Rule, No. 75; N. J. Ch. Rules, Nos. 43, 195, 201, 202.

⁷ U. S. Eq. Rule, No. 77.

⁸ N. Y. Ch. Rule, No. 76; U. S. Eq. Rule, No. 78; N. J. Ch. Rule, No. 94.

⁹ Eng. Ch. Order, 1828, No. 60; N. Y. Ch. Rule, No. 103; U. S. Eq. Rule, No. 77.

¹⁰ Eng. Ch. Order, 1828, Nos. 69, 72; N. Y. Ch. Rule, No. 105; U. S. Eq. Rule, No. 77; N. J. Ch. Rule, Nos. 196, 197, 201, 202.

¹¹ N. J. Ch. Rule, Nos. 44, 197, 202.

¹² Eng. Ch. Order, 1828, No. 61; N. Y. Ch. Rule, No. 107; U. S. Eq. Rule, No. 79.

¹³ N. Y. Ch. Rule, No. 100.

returned or filed in the office of the clerk.¹ We are now prepared to understand the statement made in a federal case where it is said that the master derives his powers from his appointment by the court, and from the equity rules which specially prescribe his duties and the manner of their performance.²

§ 169. Rules of court—Continued.—These rules sometimes confer upon the master more extended powers than he had under the English practice. In a Canadian case it is said that “the master has by our General Order (No. 42) received a larger discretion as to the conduct of references than the masters in England had.”³ It has been held that a master in chancery, or a commissioner substituted for him, *pro hac vice*, sometimes exercises greater powers, according to the practice of some of the states, than were exercised by a master in England.⁴

The question frequently arises as to how far the English rules and orders in chancery regulating practice are in force in this country. Peters, J., of the supreme court of Alabama, upon the question as to how far Lord Clarendon’s orders are in force in that state, says: “The orders above referred to, as fixing the practice of the English courts of chancery in like cases, have never been adopted as positive rules by our courts or by statute, but they may be looked to ‘as furnishing proper analogies to regulate the practice.’ . . . They are at best but guides to aid the discretion of the court.”⁵ They are binding rules of practice in this country so far as applicable. They must govern “so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.”⁶

¹ U. S. Eq. Rule, Nos. 76, 83; N. J. Ch. Rule. Nos. 164, 203, 204.

² Bate Refrigerating Co. v. Gillette (U. S. Cir. Ct. Dist. N. J., 28 Fed. 673.

³ Sculthorpe v. Burn, 12 Grant’s Ch. 427, 429.

⁴ Kirkman v. Vanlier, 7 Ala. 217, 228; Farmer v. Samuel, 4 Litt. R. 187.

⁵ Goodrich v. Goodrich, 44 Ala. 670,

680. See Rev. Code, Ala., p. 1203, rule 7; U. S. Eq. Rule, No. 90.

⁶ U. S. Eq. Rule, No. 90; Goodyear v. Prov. Rubber Co., 2 Fish. 499, 2 Cliff. 351, Fed. Cas. 5,583; Blackburn v. Selma R. R. Co., 3 Fed. 689; Smith v. Burnham, 2 Sumn. 612, Fed. Cas. 18,018. See also Rhode Island v. Massachusetts, 14 Pet. 210; Florida v. Georgia, 17 How. 478; Brown v. Aspenden, 14 How. 25.

It is clear, however, that in some jurisdictions a distinction must be recognized between the weight given to the "ancient rules of the high court of chancery," such as those promulgated by Lord Clarendon or Lord Bacon, and that given to more "recent rules," such, for example, as the Orders of 1828, and subsequent revisions of the same. This remark, however, has no application to the federal courts by reason of Equity Rule No. 90, quoted above. This rule, promulgated in 1842, by its terms gives precisely the same weight to all the English chancery orders promulgated *prior* to that date. So, too, in Alabama a chancery rule gives similar weight to all English chancery rules "prior to and including those of May, 1845, but not afterwards." But in some jurisdictions where by statute or by rule of court adopted *prior* to 1828, providing that, in the absence of a local rule or statute, the then "present practice of the high court of chancery in England" shall be followed, it is evident that a wholly different rule applies. Under such a statute or rule of court, *future* English chancery rules, changing or regulating the practice in that court, can have no force or vitality whatever, just as the federal courts refuse to follow changes made in the English practice, *after* 1842, whether made by statute or by rule of court.

In the federal courts the United States Equity Rules, as far as they apply, must govern, but the effect and meaning of the terms which they employ are necessarily to be sought in the first edition of Daniell's Chancery Practice and the second edition of Smith's Chancery Practice, both published in 1837, as being "the most authoritative works on English Chancery Practice in use in March, 1842, when our Equity Rules were adopted."¹

The orders issued by Lord Bacon, upon taking his seat as chancellor, to the number of one hundred, remain a monument to his fame as a great judge. "They are wisely conceived, and expressed with great precision and perspicuity. They are the foundation of the practice of the court of chancery, and are still cited as authority."²

§ 170. Rules of court — Continued.— Such rules of practice having the force and effect of law are binding upon litigants, witnesses and all officers of the court unless they are

¹ Thomson v. Wooster, 114 U. S. 104, 112, 5 Sup. Ct. R. 788, and note. See *post*, § 551.

² 8 Campbell's Ld. Cha., p. 114.

modified or their force suspended by the court. It is always in the power of the court to suspend its own rules or to except from them a particular case, whenever the purposes of justice require it.¹ As all rules are established to promote justice and not to embarrass or defeat it, they are open to departure, by leave of court, on good cause shown.²

§ 171. Rules of court — Continued.— These rules frequently relate to matters other than references, vesting in the master additional authority. For example, in New Jersey it is provided by Chancery Rule, that in the absence of the chancellor from the city of Trenton a petition addressed to him for an injunction may be presented to a master of the court, designated by the chancellor, whose duty it shall be to report upon the propriety of issuing an injunction, which injunction shall be issued upon filing the petition and report of the master granting the same.³ To secure uniformity of practice in the master's office, to expedite proceedings, prevent unnecessary delays and in the interest of justice, courts should see that their masters in chancery, commissioners or other officers vested with power to investigate and report conclusions upon matters referred to them are authorized to compel the attendance of witnesses, to examine them *viva voce*, to compel the production of books, papers and documents to be used in evidence,— in short, should see that they are armed, by a general order, with power to do that which the court intends they should do, without reference to, or depending upon, special orders of reference, especially as it is in the experience of every lawyer that, half the time, orders of reference are defectively drawn in regard to these particulars, the result of want of knowledge on the part of the draftsman, negligence, or the rush of business.

IV. STATUTES.

§ 172. Master's authority — Statutes.— The powers of a master, even with respect to matters referred to him by the court, are also frequently enlarged by statute, which even

¹ *Hunnicutt v. Peyton*, 102 U. S. 333, 353; *United States v. Breitling*, 61 U. S. (20 How.) 252, 254; *Southern Pac. Ry. Co. v. Hamilton*, 7 U. S. App. 626, 635; *Dredge v. Forsyth*, 2 Black, 563, 568; *Kellogg v. Forsyth*, 2 Black, 571, 573; *Gerke v. Fancher*, 57 Ill. App. 651, 657, 658.

² *Russell v. McLellan*, 3 Woodh. & M. 157, 161, Fed. Cas. 12,158.

³ N. J. Ch. Rule, No. 121.

sometimes extend the subject-matter to be investigated and reported upon. For example, in Georgia it is provided by the code that "unless modified by the order of appointment, in addition to the matter specially referred, the auditor shall have power to hear demurrers, allow amendments, and pass upon all questions of law and fact."¹ These powers, however, generally relate to the method of conducting the proceedings in the master's office. The following may be taken as illustrations: A New Jersey statute provides that in references to a master it shall be lawful for him to take and hear the evidence of all witnesses orally, and further empowers him to "employ a competent stenographic reporter to take down the evidence" for the use of the court and parties.² An Illinois statute authorizes the master "to compel the attendance of witnesses."³ The same is true in Ohio, the statute providing that the master commissioner shall have power to summon and enforce the attendance of witnesses.⁴ So in Indiana it is provided that master commissioners shall have power to issue subpoenas for witnesses whose testimony is to be taken before them; also power to compel their attendance and to punish for contempts as is given to justices of the peace. These subpoenas are executed by the sheriff, or any constable of the county to whom they are directed.⁵ In Alabama the code provides for the *viva voce* examination of witnesses upon the hearing of a reference before the register.⁶

Sometimes the mistake has been made of attempting by statute to confer judicial power upon the master. For example, in Indiana the code attempted to vest in the master commissioner power, under certain circumstances, to issue writs of *habeas corpus*, and to hear and determine all motions and matters, and make all orders concerning the same.⁷ The supreme court of that state held this provision of the code to be absolutely void as attempting to confer judicial authority upon the master commissioner, and therefore in "direct conflict with the letter and spirit of the constitution."⁸ A master com-

¹ Code, sec. 4583.

² Rev. Stat. 1895, p. 397, §§ 129, 130. 223.

³ Rev. Stat., ch. 90, § 6.

⁴ Rev. Stat., § 5223.

⁵ Code, §§ 1465, 1466.

⁶ *Mahone v. Williams*, 89 Ala. 202, 223.

⁷ Code, § 1469.

⁸ *Shoultz v. McPheeters*, 79 Ind. 378.

missioner is not a court, and judicial duties which courts only can exercise cannot be conferred upon him. But we must be careful to distinguish between this judicial power which cannot be conferred and the power upon a reference to hear matters and report facts and conclusions to the court. The power to hear causes and report facts and conclusions to the court for its judgment is not judicial within the meaning of the constitution.¹ No action which is merely preparatory to an order or judgment to be rendered by some different body can be properly termed judicial. A master in chancery often has occasion to consider questions of law and fact, but no one ever supposed him to possess judicial power.²

It is the inherent authority not only to decide, but to make binding orders or judgments, which constitutes judicial power, and the instrumentalities used to inform the tribunal, whether left to its own choice or fixed by law, are merely auxiliary to that power, and operate upon persons or things only through its action, and by virtue of it.³

In addition to these powers, pertaining to references conferred upon masters by statute, authority is vested in the master in many of the states to perform many acts which otherwise he would be powerless to do. The following examples are given: A master in Illinois is authorized to take the acknowledgment of deeds and mortgages;⁴ order, under certain conditions, writs of *ne exeat*, writs of injunction, and of *habeas corpus*.⁵ Other similar powers are conferred upon the master in that state, such as power to administer oaths, take depositions, and order the issuing of writs of *certiorari*.⁶

¹ Id. 378.

² Id. See also *Underwood v. McDuffee*, 15 Mich. 361, 368, 93 Am. Dec. 194.

³ Id.

⁴ Rev. Stat. 1895, ch. 30, § 20.

⁵ Rev. Stat., ch. 69, § 2; Id., ch. 90, § 6; Id., ch. 97, § 4.

⁶ Id., ch. 90, §§ 6, 7; ch. 51, § 24.

CHAPTER V.

HEARING IN THE MASTER'S OFFICE

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I. CARRYING THE DECREE INTO THE MASTER'S OFFICE.

§ 173. Who entitled to prosecute the reference.—The issues having all been made up, and all preliminary matters necessary to be heard by the court having been determined, the next step after the entry of the order of reference is to carry the matter into the master's office. Newland says this is done by the party whose interest it is to prosecute the decree. Daniell says: "As a general rule, the prosecution of a decree devolves upon the plaintiff; he being considered to be, in most cases, the person principally interested in forwarding it. A reference upon an interlocutory order is, for the same reason, usually prosecuted by the party obtaining it, whether plaintiff or defendant."¹ That is, as a general rule, the party obtaining a reference is entitled to the prosecution thereof in the first instance, and the adverse party has no right to carry the

¹ 2 Ch. Pr., p. 1169.

decree to the master's office until the prosecution of the reference has been committed to him, either by an order of court made upon default of the party originally entitled to the prosecution or by a provision in the decree directing the reference.¹ Under this general rule the party obtaining an order of reference, as above stated, is entitled to the prosecution thereof in the first instance; and where a decree is made on the hearing directing a reference in which both parties have an interest, the complainant's solicitor is entitled to prosecute the reference, unless the court in making the decree thinks proper to commit the prosecution thereof to the other party.² Upon the application of any party interested in "speeding the reference," where the party having the conduct of the prosecution is guilty of delay or other misconduct, the court will commit the conduct of the proceedings to some other party.³ This matter is frequently provided for by a rule of the court. For example, it is provided by United States Equity Rule 74 that "the party at whose instance or for whose benefit the reference is made shall cause the same to be presented to the master on or before the next rule-day succeeding the time when the reference was made; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference."⁴

Sometimes the rule is still more peremptory. Pennsylvania Equity Rule 17 in substance provides that if the parties shall fail to present to the master the matter referred to him "for twenty days after such reference, the order appointing the master shall become null and void, and the same be taken as vacated without further order."⁵ Under New York Chan-

¹Quackenbush v. Leonard, 10 Paige, 131; Biddulph v. Fitzgerald, 4; 23 W. R. 215; Cook v. Bolton, 5 Saussé & S. 434; Holley v. Glover, 9 Russ. 282; Brown v. Lake, 2 Coll. Ch. 620; Johnson v. Hammersley, 24 Paige, 9; Hubbell v. Warren, 8 Allen, 177. Beav. 498.

²Quackenbush v. Leonard, 10 Paige, 131, 135; Biddulph v. Fitzgerald, Saussé & Scull. Rep. 434; Benn. Off. of Master, 6; 2 Daniell, Ch. Pr. 1169.

³Simons v. Bagnell, 19 W. R. 217; Earle v. Sidebottom, W. N. (1868)

⁴Upon this whole subject of who has the right to the prosecution of the reference, see 2 Daniell, Ch. Pr., pp. 1162, 1163, bottom paging, 6th Am. ed.

⁵Hoofstittler v. Hostetter, 172 Pa. St. 575, 33 Atl. 753.

cery Rule 101, if the party having the right to prosecute the reference failed to proceed within thirty days, any other party or person interested might apply to the court, by motion or petition, to expedite the prosecution; and, after proceedings had been commenced in the master's office, if the party entitled to prosecute the order did not proceed with due diligence, the master was at liberty, upon the application of any other party interested, "to commit to him the prosecution of the reference." The master's decision under such a rule is not conclusive, and, upon his refusal to transfer the prosecution of the order to the party applying therefor, the court may do so upon a proper application for that purpose.¹ Under a general rule of court in both Canada and England, in case the party entitled to prosecute the order of reference is guilty of delay in proceeding, the master had the power to transfer its prosecution to the other party.² United States Equity Rule 77 provides that "the master shall regulate all the proceedings in every hearing before him," and Rule 74 authorizes the "adverse party" to proceed before the master at once if the party at whose instance the reference is made fails to present the matter before the master before the next rule day, while Rule 75 requires the master to proceed with diligence, and, in case of delay, authorizes the court to order the master to speed the proceedings. Under these several rules it is probably within the power of the master to take the prosecution of the reference from a dilatory party and transfer it to the "adverse party."

In Alabama it is provided by the code that the party at whose instance, or for whose benefit, the reference is made, must cause such matter to be presented to the register within the time limited for the hearing, and, if no time is limited, within three months after the reference is made; and if such party omit to do so, the adverse party may cause proceedings to be had before the register at the costs of the party procur-

¹ *Wyatt v. Sadler*, 5 Sim. 450. This decision was made under Lord Lyndhurst's Order No. 56, which was practically the same as New York Chancery Rule 101. For method of proceeding before the master to ob-

tain order for prosecution of a reference where the opposite party fails to use due diligence, see *Holley v. Glover*, 9 Paige, 9.

² *Stephenson v. Nicolls*, 14 Gr. Ch. 144.

ing the reference.¹ The usual practice is, however, for the master or his clerk to get the files at once from the clerk of the court so as to be ready to proceed at once with the reference upon application of the moving party. Sometimes the order of reference fixes the time for the parties to appear before the master.² This course is not usual except in cases of great emergency, where it appears to the court that justice demands it.

II. EXAMINATION OF DECREE AND PLEADINGS — THE ISSUES.

§ 174. Order of reference — Duties of master.—We have already seen³ that the master's authority, upon a reference, depends upon: *First*, the order of reference; *second*, the pleadings; *third*, the rules of court; *fourth*, the statutes. As to the master's authority under the rules of court and under the statutes, it being general and applicable to all cases, he is supposed to be thoroughly acquainted, but, the order of reference and pleadings in each particular case being special and applicable only to the case under consideration, requires careful examination. The order of reference being the master's commission or principal source of authority, it should first receive his attention. It contains, or should contain, special directions as to his duties to be performed. If plain and unambiguous, nothing remains to be done but to follow these directions. If it is ambiguous or uncertain in its terms, or if the master, for any other reason, finds it impossible to perform the duties required of him, he should call the attention of the parties or the court to such fact that the error may be corrected or further directions given to the master.⁴

It has been held that where a decree is manifestly erroneous, the master may refuse to proceed under it until it has been corrected.⁵ Having carefully examined the order of

¹ Code, sec. 741.

² *Ante*, ch. IV.

³ *Bullock v. Beemis*, 8 A. K. Marsh. (Ky.) 285; *Davis v. Caldwell*, 100 Iowa, 658, 69 N. W. 1037; *Lancaster v. Barton*, 92 Va. 615, 24 S. E. 251; *Smith v. Brown*, 44 W. Va. 342, 30 S. E. 160.

⁴ See *ante*, § 153, where the subject is fully discussed.

⁵ *Commercial Bank v. Graham*, 4 Gr. Ch. 419; *Mitchell v. Strathy*, 28 Gr. Ch. 80; *Adamson v. Adamson*, 28 Gr. Ch. 221, 224.

reference and familiarized himself with the directions given therein, he should next turn his attention to the pleadings and carefully determine from them the various issues submitted to him for his determination.¹ It is only by having a thorough knowledge of the issues submitted that the master will be able to make correct rulings in regard to the production of books and papers, the admission or exclusion of evidence, and properly discharge many other duties required of him.

§ 175. Issues — Allegations of fact — Conclusions.— In examining the pleadings in a cause referred to him to determine what the real issues are, the master should carefully distinguish between allegations of substantive fact and adjectives, adverbs and high-sounding phrases which are mere conclusions of the pleader and amount to nothing in law. This fault is more frequently found in bills purporting or attempting to charge fraud, the pleader being tempted to supplement or try to add force to his allegations of fact by indulging in invective and abuse of the defendant. Of such a bill Swan, J., of the United States circuit court for the southern district of Michigan, says:

“So far as the charge of fraud is concerned, it is clearly ill-pleaded. It is made in the most general terms, without stating the facts on which the charge rests. The free use of the epithets ‘fraudulent,’ ‘fraudulently,’ and ‘surreptitiously,’ neither informs the conscience of the court of the facts of the case upon which it is asked to act, nor enables the defendant to meet the accusation of wrongdoing made against him. The pleading is open to the further objection that it is lacking in certainty and positiveness, and its charges are contingently and alternatively stated. It is not enough to denounce and opprobriously characterize the party or transaction assailed, but the facts should be so stated that the nature of the matter in issue will *prima facie* warrant the relief sought.”²

A court of equity, when examining a bill of complaint to find a grievance which will justify its interposition, looks to the substantive facts averred in it, not to the adjectives or adverbs which may be added to qualify them.³ The use of

¹ As to the master's authority depending upon the pleadings see *ante*, §§ 164-166.

² *Lumley v. Wabash Ry. Co.*, 71 Fed. 21, 27, 28.

³ Per Grier, J., in *Magniac v. Thom-*

epithets, however bountifully multiplied, will not supply the place of facts.¹ "Fraudulently and collusively" are mere formal or of course, and mean nothing.² A pleading may contain "vigorous declamation" and yet be "wanting in the averment of facts, which are indispensable to give it sufficiency as a pleading, for the purpose intended."³ The words "fraud" and "conspiracy" alone, no matter how often repeated in a pleading, cannot make a case for the interference of a court of equity. Until connected with some specific acts for which one person is responsible in law to another, they have no more effect than other words of unpleasant signification. While in a case the offensive words are used often enough, yet the facts to which they are applied may not be such as to make the defendant answerable to the complainant for the damages and other relief he asks.⁴ Repetitions of the words "colorable fraud," "a breach of trust," and "a scheme," are mere legal conclusions. Instead of such epithets, it is incumbent on the pleader to "state the essential ultimate facts upon which his cause of action rests," and not content himself with such general charges.⁵ The pleader should state the facts and not formulate mere epithetic "charges." The best pleadings are those which state the inculpatory facts that carry with them their own conviction of fraud, and by which the wrong-doing appears, without any necessity for characterizing it as such.⁶

Such epithets are merely allegations of conclusions of law, which a demurrer does not admit.⁷

son, 2 Wall. Jr. 209, 254, Fed. Cas. No. 8,957; *Lumley v. Wabash Ry. Co.*, *supra*.

¹ *Clodfelter v. Hulett*, 72 Ind. 137, 144.

² *Bank of Rome v. Mott*, 17 Wend. 553, 556.

³ *Wood v. Carpenter*, 101 U. S. 135, 143.

⁴ *Ambler v. Choteau*, 107 U. S. 586, 591, 1 Sup. Ct. R. 556.

⁵ *Fogg v. Blair*, 139 U. S. 118-127, 11 Sup. Ct. R. 476.

⁶ *La Fayette Co. v. Neely*, 21 Fed. 733-744. See also *Brooks v. O'Hara*, 2 McCrary, 644, 8 Fed. 529, 532; *Com. v. Hunt*, 4 Met. 111, 136; *Munday v.*

Knight, 3 Hare, 497; *Hazard v. Griswold*, 21 Fed. R. 178; *Smith v. Hurd*, 12 Met. 371-379, 46 Am. Dec. 690; *Story*, Eq. Pl., sec. 251, 428; *Kerr*, *Fraud and Mistake*, 865; *Newell v. Bureau Co. Supervisors*, 37 Ill. 253, 256; *Elston v. Blanchard*, 2 Scam. 420, 421; *Smith v. Brittenham*, 98 Ill. 188, 199; *East St. Louis v. Millard*, 14 Ill. App. 483, 488, 489; *Klein v. Horine*, 47 Ill. 430; *Jones v. Albee*, 70 Ill. 34; *Cole v. Joliet Opera House Co.*, 79 Ill. 96; *Hopkins v. Woodward*, 75 Ill. 62.

⁷ *Ambler v. Choteau*, 107 U. S. 586, 591, 1 Sup. Ct. 556; *Fogg v. Blair*, *supra*; *Dillon v. Barnard*, 21 Wall. 430; *United States v. Ames*, 99 U. S.

§ 176. **Admissions in pleadings or in open court.**—Another object in the examination of the decree and pleadings is to see what admissions, if any, have been made by the parties and binding upon the master. Admissions made in the progress of a cause must be such as are found in the pleadings, those made in open court and embodied in the order of reference, or otherwise certified to the master, and, lastly, those made by the parties, or their solicitors, in the master's office after the case has been referred. It is only with the first two that we are now concerned, the effect of the latter being discussed further on.¹ A party is bound by his admissions of fact made in the progress of a cause, whether found in the pleadings or made in open court. It would be bad faith to allow a party who has, in the supposed interest of truth and justice, deliberately admitted the existence of a fact, afterward to deny it. The court will not permit a party to trifle with it by thus "playing fast and loose," as interest or caprice may prompt him. For this reason a plaintiff is bound, upon a reference to a master, by admissions made in his bill. Facts so admitted need not be proven. He cannot go back on his bill.²

So, too, a defendant is bound by admissions made in his answer, whether made under oath or not.³ As long as his state-

85-45; *Pullman's Palace Car Co. v. Missouri Pac. R. Co.*, 115 U. S. 587; *Lumley v. Wabash R. Co.*, 71 Fed. 21-28; *Brooks v. O'Hara*, *supra*; *Hazard v. Griswold*, *supra*; *La Fayette v. Neeley*, *supra*; *Munday v. Knight*, 3 Hare, 497, 501; *Magniac v. Thompson*, 2 Wall. Jr. 209, 254, Fed. Cases No. 8,957; *Sterling Gas Co. v. Higby*, 134 Ill. 557, 25 N. E. 660; *Lawrence v. Traner*, 136 Ill. 474, 27 N. E. 197; *Wilkinson v. Gage*, 40 Ill. App. 603; *Myers v. Wright*, 33 Ill. 284; *Harris v. Cornell*, 80 Ill. 54; *Newell v. Bureau Co. Supervisors*, 37 Ill. 253; *Hickey v. Stone*, 60 Ill. 458; *Stow v. Russell*, 36 Ill. 18; *Kankakee & Seneca R. Co. v. Horan*, 131 Ill. 288, 23 N. E. 621; *Johnson v. Roberts*, 102 Ill. 655; 6 Enc. Pl. & Pr. 334, 336. For uncertainty of allegations, see *Metcalf v. Hervey*, 1

Henchman, 1 Ves. 287; *Cresset v. Mitton*, 1 Ves. 449; *Ryves v. Ryves*, 3 Ves. 343; *The Mayor, etc. v. Levy*, 8 Ves. 398; *Jones v. Jones*, 3 Mer. 161; *The Princess of Wales v. The Earl of Liverpool*, 1 Swans. 114, 126; *MacGregor v. The East India Co.*, 2 Sim. 454; *Mendizabel v. Machado*, 1 Sim. 68, 77; *Walburn v. Ingilby*, 1 Myl. & K. 61; *Hardman v. Ellames*, 5 Sim. 640; s. c., 2 Myl. & K. 732; *Stansbury v. Arkwright*, 6 Sim. 481; *Frietas v. Dos Santos*, 1 Younge & J. 574. See further on this subject, *post*, § 341.

¹ *Post*, § 183.

² *Woodfin v. Anderson*, 2 Tenn. Ch. 331, 339.

³ *Reed v. Cumberland Ins. Co.*, 36 N. J. Eq. 393, 396, citing *Symmes v. Strong*, 1 Stew. Eq. 131; *Bartlett v. Gale*, 4 Paige, 503; *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 65.

ments stand in his answer he is bound by them. If untrue, or made under mistake, he should apply for leave to amend.¹

It is not necessary to take testimony in support of allegations which are admitted in the answer of the defendant, but if the court is satisfied by affidavit that the admission was made under misapprehension or mistake, the court will relieve the party making it from its effect by an order directing so much of the answer as contains the admission to be treated as no part of the record.² An admission voluntarily made in open court by a party under oath in a cause is conclusive against him.³

In conclusion, we offer the following general suggestions:

First. An admission to be binding upon the parties must be satisfactorily established — must come to the master, in other words, duly authenticated. This is done when found in the pleadings, for they go with the order of reference to the master. If not found in the pleadings they should be inserted in the order of reference,⁴ or evidenced by a stipulation signed by the parties.

Second. It must relate to facts and not to matters of law.

Third. Such admissions to be effective must be full, definite and unequivocal. The only admissions which can be made by the parties that are binding upon the court are admissions of fact. Admissions as to what the law is applicable to the facts may be wholly ignored by the court.⁵ If a master relies upon admissions of a party in the bill or answer he should remember that such admissions to be conclusive upon a party must be full and unequivocal, and must not be inferences drawn

¹Emerson v. Atwater, 12 Mich. 314.

²Maher v. Bull, 39 Ill. 531. See further as to admissions in answers of defendant, Standish v. Babcock, 48 N. J. Eq. 386, 22 Atl. 734; Hudson v. Trenton Locomotive, etc. Co., 16 N. J. Eq. 475; Mead v. Combs, 26 N. J. Eq. 173. See 1 Am. & Eng. Enc. of Pl. & Pr. 914; Home Ins. Co. v. Myer, 93 Ill. 271, and other authorities cited in 1 Am. & Eng. Enc. of Pl. & Pr. 927, 928, 929, 930, 931 *et seq.*; Schwarz v. Wendell, Walk. Ch.

(Mich.) 267; Attorney General v. Oakland County Bank, *id.* 90; Van Dyke v. Davis, 2 Mich. 144; Hunt v. Thorn, *id.* 218; Robinson v. Cromelein, 15 Mich. 316; Morris v. Hoyt, 11 Mich. 9; Morris v. Morris, 5 Mich. 171.

³Potter v. Hollister, 45 N. J. Eq. 508, 518, 519, 18 Atl. 204.

⁴Mirehouse v. Barnett, 22 Sol. Jour. 683; Watson v. Rodwell, 11 Ch. D. 150.

⁵Rice v. Ruddiman, 10 Mich. 125, 137.

from other admissions, unless the express admission is so closely connected with the one to be inferred that to disprove the latter would disprove the former.¹

III. REGULATING THE PROCEEDINGS IN THE MASTER'S OFFICE.

§ 177. **Regulating the proceedings.**—United States Equity Rule No. 77 provides as follows:

“The master shall regulate all the proceedings in every hearing before him, upon every such reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all the matters contained in the reference, and also to require the production of all books, papers, writings, vouchers and other documents applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate from the clerk's office or by deposition, according to the acts of congress, or otherwise, as hereinafter provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.” This rule renders reference to the cumbersome and complicated English practice no longer necessary, and provides in lieu thereof a simple and expeditious practice.²

Sometimes a rule of court sets out more in detail the different steps to be taken on a hearing before the master. For example, the New Jersey Chancery Rules provide that a hearing before a master shall be conducted precisely as a trial before a jury. The rules are as follows:

“At the time for which notice is given or designated for hearing, both parties shall attend with their witnesses and other evidence, and the cause shall proceed, as at a trial at law before a jury, by the oral examinations of the witnesses on both sides continuously, until all the evidence has been produced

¹ Schwarz v. Sears, Walker Ch. (Mich.) 19, 22.

² Hatch v. Indianapolis & S. R. R. Co., 11 Bissell, 188, 9 Fed. 856.

and closed; the party holding the affirmative first producing all his evidence, and, after resting, he shall be permitted to produce evidence in rebuttal only; but the vice-chancellor (or master) may, in his discretion, reserve to either party the right to produce one or more witnesses, who shall be named, to be examined orally or by deposition at a future day. But such right shall not be granted, unless the vice-chancellor (or master) be satisfied that due diligence has been used to procure the attendance or deposition of such witness before the trial, nor unless it be fairly disclosed what is expected to be proved by such witness, and such evidence shall appear to be material, and shall not be admitted by the other party or parties."

"When a stenographer, appointed by the vice-chancellor (or master), shall attend to take down the testimony, the examination shall proceed as rapidly as counsel can ask, and the witness answer, the questions. The examining counsel shall not take notes, nor shall the examination be delayed in order that any counsel or other person, except the reporter, may take minutes of the testimony. But every effort shall be made by the court and counsel to expedite the cause, so far as may be consistent with a full and fair hearing thereof." "The competency of evidence shall be determined by the vice-chancellor (or master), who, upon the objection of either party or upon his own motion, shall exclude evidence that may be illegal or irrelevant."¹

The above rules are well calculated to produce an orderly and speedy hearing in the master's office, should be adopted by every chancery court in this country, and strictly enforced. If this were done it would tend largely to do away with the unreasonable delays met with under the present loose practice. In other cases the statute provides for the method of proceedings upon a reference. For example, in Alabama it is provided by the code,² that upon a reference the register shall have power: "(1) to examine the parties on oath as to all the items of reference; (2) to require the production of all books, papers, writings, vouchers, and documents in relation to such matters; (3) to examine on oath, *viva voce*, all witnesses

¹ N. J. Ch. Rules, Nos. 196, 197, 198, 202.

² Sec. 748.

produced by the parties before him, and take down such evidence in writing; (4) to hear the depositions of witnesses taken under a commission, or upon oral examination, as in other chancery cases; (5) to do all other acts, and direct all other inquiries and proceedings in matters before him, which may be necessary, subject at all times to the revision and control of the chancellor."

§ 178. *Regulating proceedings — Continued.*—In case there is no local rule of court or statutory provision regulating proceedings in the master's office, or vesting in the master power to regulate such proceedings, then English Chancery Order of 1828, No. 51, confers such authority. This order is as follows:

"That at the time so appointed for considering the matter of the said decree or order, the master shall proceed to regulate as far as may be the manner of its execution; as for example, to state what parties are entitled to attend future proceedings, to direct the necessary advertisements, and to point out which of the several proceedings may be properly going on, *pari passu*, and as to what particular matters interrogatories for the examination of the parties appear to be necessary, and whether the matters requiring evidence shall be proved by affidavit or by examination of witnesses; and in the latter case, if necessary, to issue his certificate for a commission; and if the master shall think it expedient so to do, he shall then fix a certain time or certain times within which the parties are to take any certain proceeding or proceedings before him."¹

We may safely say, in conclusion, that in every case it is the master's duty to regulate the manner of executing the reference, and the several steps to be taken by the parties, and this should be done at the coming in of the parties in obedience to his notice or summons; and at any subsequent attendance of the parties before him, he should give such further directions, in relation to the proceedings, as may have become necessary in the progress of the reference.²

¹ 2 Smith, Ch. Pr. (Ed. A. D. 34) ² Story v. Brown, 4 Paige, 112, 564. See to the same effect, N. Y. 114.
Ch. Rule, No. 102.

The power to thus regulate proceedings in the master's office is limited in four particulars:

First. The ruling of the master must not be in conflict with any statutory provision. For example, the statute of New Jersey provides that the hearing in the master's office shall be conducted precisely as a jury trial in open court. Any attempt of the master to provide a different method would of course be nugatory.

Second. The action of the master must not be in conflict with any rule of the court. For example, a chancery rule in Alabama provides that witnesses upon a hearing before the register are to be examined *viva voce*. Any attempt upon the part of the master to establish a different rule would be futile.

Third. The discretion of the master in regulating proceedings before him must not be arbitrary, but, on the contrary, must be reasonable. A ruling of the master calculated unnecessarily to work an injury to a party would not be sustained.

Fourth. Every action of the master regulating proceedings before him is open to review on appeal to the chancellor.

IV. FIXING TIME AND PLACE OF HEARING.

§ 179. Fixing time of hearing.—When the party having the prosecution of the reference brings the order into the master's office it is the duty of the master, unless otherwise directed, to fix the time of the hearing. This should be as early as the convenience of the parties and the duties of the master will admit. The time of such hearing is usually a matter of discretion with the master. The rules of court, however, governing hearings before masters usually contain a provision intended to expedite causes. For example, United States Equity Rule No. 75 provides that:

"Upon every such reference it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, . . . and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay."

In New Jersey it is provided by chancery rule as follows:

"When a cause referred to a vice-chancellor (or master) shall

be at issue, either party may, upon five days' notice to the other party or parties, apply to the vice-chancellor (or master) to whom the cause is referred to fix a time and place for the hearing thereof; and upon such application, such vice-chancellor (or master) may designate such time and place; and upon fifteen days' notice, in writing, of the time and place so designated, given by either party to the other or others, the cause may be heard."¹

It is provided by Supreme Court Equity Rule in Pennsylvania, that, when a case in equity is referred to a referee, he shall proceed at once upon his appointment to fix a day for trial, which shall not be more than three months after his said appointment.²

§ 180. Fixing time of hearing — Continued.—The chancery rules of the circuit and superior courts at Chicago provide that, whenever a reference shall be made, the master shall, "as soon as practicable, fix a day to proceed with the taking of testimony or evidence."³ The above rules are simply given as samples of the usual ones adopted by courts of chancery for the purpose of expediting proceedings upon references to masters. Of course the master and counsel will look to the local rules of the court under which they are acting for guidance, and, if there be no local rule upon the subject, then to the English Chancery Orders, which vest full power in the master in this regard.⁴ In fixing such time the master should not be controlled by the desire of one party alone, but should consult the convenience of all parties.⁵ Before fixing the time of hearing he should not only consider the convenience of all parties, but should also see whether the time of returning his report is limited by statute,⁶ or by the order of reference, or by the rules of the court,⁷ as such a limitation may render it

¹ N. J. Ch. Rules, Nos. 195, 201.

² 1 Brewster, Eq. Pr., § 5177.

³ Rules "Governing Masters in Chancery," No. 1.

⁴ See English Ch. Orders, 1828, Nos. 50, 52.

⁵ Quackenbush v. Leonard, 10 Paige (N. Y.), 131.

⁶ The statute of New Jersey provides that upon a reference upon ex-

ceptions to a bill or answer the master must report within thirty days after exceptions filed. Gen. Stat. (1895), p. 878, § 84.

⁷ By rule 17 of Penn. Eq. Rules the hearing has to be concluded and the report returned within six months. Hoofstittler v. Hostetter, 172 Pa. St. 575, 577.

necessary for the master to fix an earlier date for the hearing than he otherwise would do.

The question arises sometimes whether or not the master may proceed with a hearing during vacation. This of course depends upon the rules of the court. The master derives his authority from the court, and his authority continues after the adjournment of the court, unless there is some special rule to the contrary.¹ Of course, if the master proceeds in vacation, in violation of a rule of the court, it will be ground for setting aside his report, unless the error is waived. In Canada, where a rule of court required the master's office to be closed during the long vacation, a report made during such vacation without notice to the party affected by it was held to be entirely null and void. The objection appears upon the face of the proceedings, and is in effect as fatal as if the report had been made *ex parte*, on a Sunday, or other non-judicial day.² Formerly by the same court it was held to be erroneous to proceed with a reference during the long vacation,³ but later the same court held that the master may proceed with a reference in vacation.⁴

§ 181. Fixing place of hearing.—The same rules that gave the master authority to fix a time for the hearing make it his duty, also, to fix the place of hearing. This should, ordinarily, be within the district for which the master is appointed. Sometimes it has been held that, under extraordinary circumstances, the place of hearing may be beyond the jurisdiction of the court. The authority of the master in chancery in the United States courts is not confined to the district in which he was appointed, but extends over the whole country, and he may even take testimony in foreign countries. In a recent case the master entered the following order, to wit:

“The master will resume and continue the accounting in this cause on part of the defendants at the North-Western Hotel, in the city of Liverpool, England, on the 17th day of

¹ Sweeney v. Kaufmann, 168 Ill. 233. Ch. R. 542. See also Fuller v. Mc-

² Fuller v. McLean, 8 P. R. (Ont.) 549; Holmstead's 549, citing Harrison v. Smith, 9 B. & Ch. Orders, 89.

C. 243; Mumford v. Hitchcocks, 14 C. B. (N. S.) 361, 9 Jur. (N. S.) 1200. ⁴ Marples v. Rosebrugh, 17 P. R. (Ont.) 104; Holmsted & Langdon's

³ Anderson v. Thorpe, 12 Grant's Jud. Act, 825.

August, 1886, at 12 o'clock M. of said day, and will continue thereafter, pursuant to adjournments from day to day, with the examination of such witnesses as may be produced on the part of the defendants; and thereafter adjourn to the St. James Hotel, on the corner of Piccadilly and Berkley streets, in the city of London, England, and there proceed with the examination of such witnesses as may be produced before him on the part of the defendants."

At the request of the complainant the matter was certified to the court, and, in denying the motion to vacate the order for want of power on part of the master to enter it, Judge Wales remarks: "The master derives his powers from his appointment by the court and from the equity rules, which specially prescribe his duties and the manner of their performance. The 75th and 77th of these rules appear to give him ample authority to make the order, unless it can be shown that the exercise of his official power is restricted to the district of New Jersey, or to the territory of the United States. The rules are silent upon these matters, but the universal practice under them has been to permit the master to act outside of the territorial jurisdiction of the court, and, if we are correctly informed, without any limit as to places within the boundaries of the United States. And if this be so, what written or unwritten rule of practice is there which forbids the master to take testimony in London or Vienna, as well as in Boston or San Francisco? . . . The absence of any express or implied prohibition on this subject in the rules, and the fact that practically no restriction has hitherto been placed on the master in reference to the state or country in which he may take testimony, seem to warrant the conclusion that in the exercise of a sound judicial discretion he is at liberty to make such an order when he thinks it proper."¹ In another case it was held that the master might, in his discretion, take testimony outside of his district.²

In any event the master should consult convenience of the parties. Sometimes the place of hearing is fixed by statute or by a rule of the court. For example, the Alabama code pro-

¹ *Bate Refrigerating Co. v. Gillette* (U. S. Cir. Ct. Dist. N. J.), 28 Fed. R. 673.

² *Consolidated Fastener Co. v. Columbian Button & Fastener Co.*, 85 Fed. 54.

vides that a register must keep his office at the place at which the court, of which he is register, is held.¹ And it is provided by Chancery Rule 88, that "the sessions of the register, as master in chancery, shall be held at his office, unless the chancellor or court otherwise directs, or he himself appoints a different place by consent of parties."

An objection that the hearing was had beyond the territorial jurisdiction of the court is waived if objection is not made at the time of the hearing, unless the face of the report shows that the decision was made outside of the jurisdiction.² This is under the theory that every presumption is in favor of the regularity of the proceedings.³ Of course, by consent of the parties the hearing may be had at a place beyond the limits of the master's district; so, too, a failure to raise the objection at the proper time validates a hearing had at a place which otherwise would be held improper. In Georgia it is provided by the code, sec. 4584, that the auditor shall not hear evidence or argument outside of the county in which the case is pending, unless by written consent of all parties. Yet, in a case where the master fixed the time, and appointed as the place, Marietta, Georgia, said place being outside of the county where the suit was pending, counsel appeared and moved for a continuance, and the time and place were again fixed without objection, it was held that it was too late to raise objection, and that counsel by such conduct waived the right to object even at the next meeting.⁴

V. PRELIMINARY MEETING.

§ 182. Preliminary meeting in the master's office.— In all important contested cases, and especially in cases of complicated accounting, the first meeting in the master's office should be a preliminary one for the purpose of "considering the decree." So important was this preliminary meeting considered in the English practice that it was provided for by an order of court.⁵ Smith says of this practice, that, when carried

¹Sec. 656.

²Blevins v. Morledge, 5 Okla. 141, 143, 47 Pac. 1068.

³Id.

⁴Perseverance Mining Co. v. Bisener, 87 Ga. 198, 195, 18 S. E. 461.

⁵See Rule No. 50, Chancery Orders 1828; 1 Smith's Ch. Pr., pp. 564, 565.

into operation according to the intention of the court, there are few regulations "more calculated to prove of benefit to the suitor, or more conducive to regularity than this order. The solicitors of the parties all meet together before the master; the mode of prosecuting the decree is arranged; if an objection is raised to the attendance of any party, it is decided before any expense has been incurred; the number of parties who are to be served on the several proceedings is canvassed and fixed, and certain times are limited for the several proceedings; and suggestions, and mutual communications pass between the solicitors."¹ A rule of court in Ontario provides for this first meeting in the master's office as follows: "Before proceeding to the hearing and determining of a reference, the master may appoint a day in the meantime for the purpose of entering into the accounts and inquiries, with a view to ascertaining what is admitted and what is contested between the parties."² Though without any rule upon this subject, under the authority vested in the master to "regulate the proceedings upon a reference," the master should, among other things, ascertain from the parties and their counsel, as near as may be, the exact matters in controversy, that is, the actual items to be contested. For this purpose the master should require the parties to file written statements of their respective claims in his office. Chancellor Kent says that the master ought, in the first instance, to ascertain from the parties or their counsel, by suitable acknowledgments, what matters or items are agreed to or admitted; and then, as a general rule, and for the sake of precision, the disputed items claimed by either party ought to be reduced to writing by the parties respectively, and the proofs ought then to be taken on written interrogatories prepared by the parties, and approved by the master, or by *viva voce* examination, as the parties shall deem most expedient, or the master shall think proper to direct.³

By pursuing this course, definite written, classified statements of matters in dispute are obtained, to which disputed items the evidence can be confined, and thus much labor,

¹ Id., vol. 2, p. 90.

² Remsen v. Remsen, 2 Johns. Ch.

³ Holmsted & Langton's Act of Judicature, 1898, p. 860, Rule 678. 495, 501; Daniell, Ch. Pr. 1222, note.

time and expense saved. Ordinarily the bill and answer, with its technical denials of all the plaintiff's allegations, puts the plaintiff upon proof of many matters about which there is no dispute. By adopting the plan suggested all matters not contested are eliminated, and the controversy is narrowed down at once to the items actually in dispute. When this course is pursued it is erroneous to admit any evidence except as to the items contained in such disputed lists.¹ In this way the range of investigation may often be greatly narrowed and the matters really controverted specifically defined, thus greatly lessening both the labor and the expense of taking the proof and making the report.² All matters which counsel know cannot be successfully contested should be frankly admitted, especially such as contents of records, books and other documents, also deeds, names of persons and their relationship.³

§ 183. Preliminary meeting in the master's office — Continued.— We have already seen that admissions to be binding on the parties in the master's office are divided into three classes. *First.* Admissions in the pleadings. *Second.* Admissions in open court prior to the reference, and certified to the master in the order of reference, or otherwise. *Third.* Admissions made in the master's office. The effect of the first two has been fully discussed,⁴ but we are now speaking of the third class — admissions in the master's office. The first and, perhaps, most important matter is that, whether admissions are made at this preliminary meeting or in any subsequent stage of the proceedings, the evidence of the same should be unmistakably preserved. The master may act on admissions of the parties made before him. An order of the chancellor, 1696, required the master to "take memorandum of the fact so admitted or agreed to, in his book of minutes," and required the party to subscribe such minutes in the presence of the master. Harrison says: If either party by his counsel, or solicitor, admits a matter of fact, the master ought to make an entry thereof in his minute book, which the party admitting in his presence subscribes; and this is conclusive to such party, and

¹ Patterson v. Johnson, 113 Ill. 559, 575; Remsen v. Remsen, 2 Johns. Ch. 495, 501; Williams v. Lindblom, 163 Ill. 346, 348, 45 N. E. 245; Daniell, Ch. Pr. 1232.

² Gibson, Suits in Ch., § 588.

³ Id., note.

⁴ Ante, § 176.

the adverse party shall not be put to any proof of that matter.¹ The master cannot be too particular in this regard, as it is very embarrassing, after action has been taken upon the admission, or waiver, of a party, and a report made based thereon, to have a question of fact raised between the party and master as to the making of such admission.² For example, a master by his report certified that the defendant had submitted to a certain act; to which the defendant excepted, insisting that he made no such admission. It was held by the lord chancellor that by means of the report the burden of proof was thrown upon the defendant, whose affidavit, at least, was necessary to falsify what had been certified; for though there was no reason that the master's report should be arbitrary and conclusive upon any one, yet it shall be presumed *prima facie* to be true, and it rests upon the other side to show the contrary.³

VI. WHO ENTITLED TO APPEAR IN THE MASTER'S OFFICE.

§ 184. Parties entitled to appear in the master's office.— At the first meeting of the parties in the master's office it is the duty of the master to decide as to what parties are entitled to appear before him. This is done under authority vesting in him power to regulate the proceedings upon a reference.⁴ As to who is entitled to attend Daniell states the rule as follows: "In general, all parties beneficially interested, either in the estate or in the fund in question, are considered entitled to attend before the master on all those proceedings which may affect their interest, or increase or diminish their proportion in the fund; thus, all parties entitled to a distributive share of a residue are entitled to attend all those proceedings which tend to increase or diminish the residuated fund."⁵ The rule above stated is, however, subject to some limitations, where a fund distributable under a will is sufficient; thus, general legatees are allowed to attend only on those proceedings which strictly

¹ 2 Harr. Ch. Prac. 95; Ord. Chan. 254; Pr. Reg. Ch. 864.

² Gresley, Eq. Ev. 505.

³ Allen v. Pendlebury, 8 P. Wms. 142, note.

⁴ See *ante*, §§ 177, 178, and *post*,

§§ 184, 185, div. 3, "Regulating Proceedings in the Master's Office."

⁵ 2 Daniell, Ch. Pr. (1st ed.) 801; Id. (6th ed.), 1178, quoted and approved in Craig v. McKinney, 72 Ill. 805, 814. See also 1 Barb. Ch. Pr. 477.

affect or relate to their legacies, and not on the general proceedings; but if the fund is not sufficient to pay the legatees in full, they are entitled to attend all proceedings which relate to, or may affect, the fund out of which they are to be paid.¹ Trustees are not allowed (except in proceedings carried on by themselves) to attend before the master in cases where all the *cestuis que trust* are before the court; but if there are any parties in being, or who may become interested, and whose interests are only represented by the trustees, the trustees will be allowed to attend the proceedings affecting those interests.² So, too, parties having charges on an estate or fund are, if the estate or fund is sufficient, entitled only to attend on the proceedings brought in by themselves; but if there is a deficient fund, each incumbrancer is entitled to attend on the claim of those incumbrancers who claim priority over him. The same rule applies to creditors.³

As to who have the right to be present at the hearing when a master is taking an account, Hoffman says that "the parties in the cause who have appeared have of course a right to attend; a person who comes in regularly under the decree, as one on whose behalf the bill has been filed, and having a common interest with the plaintiff, has also a clear right to attend. What other persons may do so is uncertain. Mr. Browne says,⁴ that in *Power v. Hayne* it was settled that in matters of account, all the parties who are interested in the fund, either presently or in reversion, have a right to attend before the master. He does not state the case, or where it is reported; and I have not found it in any of the digests or reporters. Mr. Bennett says⁵ that all parties to the suit having or claiming an interest in the present or ultimate fund are at liberty to attend the masters by themselves or their solicitors. It seems to me that the masters should, in general, be guided by the principle before adverted to, and admit only parties who can come in under the decree, and take, if necessary, the conduct of the suit."⁶

¹ 2 Daniell, Ch. Pr. (6th ed.) 1173;

¹ Barb. Ch. Pr. 477, 478.

² 2 Daniell, Ch. Pr. (6th ed.) 1173;

¹ Barb. Ch. Pr. 478.

³ Id.

⁴ Vol. 2, Prac., p. 805.

⁵ Bennett's Prac., p. 9.

⁶ 1 Hoffman, Ch. Pr. 520.

Whenever there are assets or funds being administered or distributed by the court, and the master is directed to report the parties interested therein, or having claims thereto, as creditors, legatees, distributees, beneficiaries or otherwise, any such person, even when not a party to the suit, is authorized, under such an order, to set up his claim to such assets or funds. To properly do this he must present his petition, either in open court, or before the master, praying to be allowed to come in under the decree, and file and prove his claim. This petition must be duly verified and should detail the particulars of the claim, and the circumstances under which it arises, and duly supported by affidavits. On the filing of such a petition the claimant is entitled to all the rights of any other party, so far as is necessary to prove or defend his claim, and is entitled to the production of all documents in the possession or power of any of the parties to the suit relating to his claim, and conversely, the other parties are entitled to the like production of documents in his power or possession.¹

§ 185. Parties entitled to appear in the master's office—Continued.—Where the court is administering a trust fund any creditor will be permitted to come in and prove his claim before the master without first being made a party to the suit.² If a fund for distribution is sufficient to pay all claims, one creditor has no interest to dispute the debt of another; but if a fund is insufficient to meet all demands, one creditor can contest the claims of others in the same manner as if it were an adversary suit. Such contests between creditors are primarily conducted before the master, and his findings, as in all other cases, are deemed *prima facie* correct.³ In other words, in the scramble for an insufficient fund, where there are no priorities, each creditor may contest the claim of every other, for the reason that the allowance made to each affects the *pro rata* of all. Hence, in such cases, all are entitled to attend upon all proceedings, and likewise must have notice of all hearings.⁴ A defendant defaulted either for want of an appearance or an answer, unless there is a statute or a rule of court to the con-

¹ Gibson, Suits in Ch., § 589.

Cir. Ct. W. D. N. C.), 20 Fed. 777; 1

² Pennell v. Lamar Ins. Co., 78 Ill. 803, 810.

Story, Eq. Jur., § 548.

⁴ 1 Barb. Ch. Pr. 479; 2 Daniell, Ch.

³ Terry v. Bank of Cape Fear (U. S. Pr. (6th ed.) 1210, note.

trary, has the right to appear before the master, if he chooses, object to his findings, file exceptions to the report and resist its approval.¹

From what has been said the general rule may be stated as follows: All persons beneficially interested while actual parties to the suit, or such as have become *quasi*-parties by another form, and established a claim, are entitled to attend any reference before a master, whatever the object is, as it may affect their interest or increase or diminish the fund.² Daniell says, if any person can show sufficient reason why he should be allowed to attend the proceedings before the master, he will be permitted to do so, though not a party or *quasi*-party to the cause or matter. The application for such permission is made by summons; which must be served on the parties to the cause, and be supported by evidence showing the interest of the applicant in the matters in question. The order is usually made on terms as to costs occasioned by such attendance.³ If the master refuses to allow a party to attend before him, who thinks he has a right to do so, the proper method of obtaining the opinion of the court upon the question, is to present a petition praying that the party may be permitted to attend the master on the reference.⁴

VII. NOTICE OF PROCEEDINGS IN THE MASTER'S OFFICE.

§ 186. Necessity of notice.—In all proceedings where the rights of a party are to be adjudicated upon, it is necessary that the party whose rights are to be affected should have due notice; hence, it is a maxim of the law that “every man is entitled to his day in court.” This right he is deprived of if proceedings are had affecting his interest without his knowledge or consent. This rule of notice extends to proceedings in the master's office as well as to proceedings in court. A judge might as well proceed to enter judgment in a cause where there has been no service, as for a master to proceed to

¹ Moore v. Titman, 33 Ill. 358, 366; Daniell's Ch. Pr. 1172; Beach, Eq. Pr. 1 Barb. Ch. Pr. 479. See post, § 213, 687.

div. 10, “Defaulted Defendants —” ² Ch. Pr. 1174.

Rights of.” ⁴ 1 Barb. Ch. Pr. 479, 480; 2 Daniell,

³ Adam's Eq. (7th Am. ed.) 383; 2 Ch. Pr. 1174.

pass upon the rights and interests of a party without due notice to him. It is therefore the right of all parties in interest, upon a reference to a master, to have notice of proceedings in the master's office.¹ In the case of a reference to a master in a bill for accounting, notice of hearing before the master is absolutely necessary.² "Parties cannot be expected to know at their peril that testimony may be taken at the master's office, when neither an adjournment or a notice advised them of it."³

§ 187. Necessity of notice — Continued.— But to this rule there are many exceptions.

First. The rule only applies to contested cases or matters. For example, where witnesses are to be examined the parties to be affected by their testimony must be duly notified, because it is their right to be present and cross-examine.⁴ But where there can be no contest in the master's office, notice is unnecessary; that is, notice is unnecessary where there is no contest over the matter to be reported.⁵ Thus, where a reference to a master is solely for the purpose of making a calculation, no testimony to be taken, but a "mere substitution of the master for the court in a matter of convenience involving no discretion, and the court could have determined the result for itself, and could not have arrived at a different result with an ordinary knowledge of the rules of arithmetic," no reference in the ordinary sense is designed, but the order contemplates an immediate report and decree on the computation. No notice to the parties is necessary, and no hearing is had before the master.⁶ Upon a re-reference to a master to enable him to correct a mere formal error, no notice to the parties need be given; but if any material change of his findings is to be made, or if he desires to reverse his former rulings, either as to the law or the evidence, he must bring the parties before him again by notice and give them an opportunity to rediscuss the matter.⁷

¹ Craig v. McKinney, 72 Ill. 305.

² Acme Copying Co. v. McLure, 41 Ill. App. 397, 399; Huling v. Farwell, 33 Ill. App. 238; s. c., 132 Ill. 112.

³ Rice v. Schofield, 9 N. Mex. 314, 51 Pac. 673.

⁴ Union Mutual Life Ins. Co. v. Slee, 123 Ill. 57, 67, 83, 12 N. E. 543.

⁵ Mosby v. Hunt, 9 Heisk. 675, 677;

Nobles v. Hogg, 36 S. C. 322, 15 S. E. 359.

⁶ Kellogg v. Putnam, 11 Mich. 344; Michigan Ins. Co. v. Whittemore, 13 Mich. 428.

⁷ National Folding-Box & Paper Co. v. Dayton Paper-Noveltty Co., 91 Fed. 822.

The same rule applies where the reference is merely for the purpose of making a clerical computation, which might easily have been made by the court or counsel. In such a case a reference is wholly unnecessary. There being nothing to be done but compute the amount due on the face of the papers, the report of the master ought not to be disturbed because the master failed to give notice of the hearing before him.¹ So, also, where a reference is had to a master to state the account from proofs already taken in the cause, no notice is required; the object of notice being to enable parties to produce proof which, under such a reference, is inadmissible.² But it was held that parties are entitled to notice before a master, although only records are to be examined.³

Second. Where a party, after suit is brought, has parted with all interest in the matter in controversy, he has no ground to complain of the fact that he had no notice of proceedings before the master in the foreclosure of a second mortgage.⁴

Third. A party may have an interest in the matter to a certain extent and yet not be entitled to notice, except as to matters affecting such interest. Thus a party may have a charge against a fund being administered by the court, and yet, if such fund is sufficient to pay all demands, he is not entitled to notice of the proceedings, except as to the allowance of his own claim.

Fourth. Parties who have been defaulted for *want of appearance* are not entitled to notice of proceedings in the master's office. It is only in contested cases, where a reference is made, to report evidence, or to hear proofs and report facts, that the rule is applicable. It is true, the parties being in court, have a right, in a case where the bill is taken as confessed, to appear before the master if they think proper, and upon the master's making report of his computation, may file exceptions and resist its confirmation, but the practice does not require any notice to be given.⁵ The fact that a defendant so defaulted for want of appearance may, if he chooses, appear before the master upon the hearing and may file exceptions and resist the

¹ *Allis v. Insurance Co.*, 97 U. S. 144.

⁴ *Ward v. Montolair Ry. Co.*, 26 N. J. Eq. 260.

² *Calvert v. Carter*, 18 Md. 78.

⁵ *Moore v. Titman*, 33 Ill. 858, 866;

³ *Wardlow v. Erskine*, 21 S. C. 859. *Craig v. McKinney*, 72 Ill. 305, 314.

approval of the report, does not alter the rule.¹ But a wholly different rule applies to parties who have *appeared* in a cause and afterward defaulted for *want of an answer*. Such parties must be notified of proceedings in the master's office.² Sometimes this matter of notice to defaulted defendants is regulated by rule of court. For example, in New Jersey a defendant who has been defaulted, and against whom a decree *pro confesso* has been entered, is not entitled to notice of proceedings before the master, as "rule 4, art. 14, of the rules provides that where the complainant's bill shall be ordered to be taken *pro confesso*, and there shall be a reference to a master ordered, the complainant may proceed before the master without notice to the defendant."³ And in Alabama it is provided by Chancery Rule No. 92 that: "The register shall not be required to give notice of the taking of an account to any defendant who has failed to answer the bill."

§ 188. Method of giving notice—Its sufficiency and form.—Having considered the necessity of notice of proceedings upon a reference, it remains for us to examine the method, sufficiency and form of such notice; in other words, the method of bringing the parties interested in the subject-matter before the master. Under the English practice the parties interested in the subject-matter of the reference were brought before the master by means of a summons or warrant. A summons is a paper entitled in the cause and signed by the master, appointing a time and place for the parties concerned to attend him on the matter of the reference. The summons itself is very general in its form; but it is usually followed by an underwriting or memorandum expressing the object of the attendance. The summons is usually in the following form:

Form of Notice.

(*Title of cause.*) "By virtue of an order of reference in this cause, dated the —— day of ——, I do appoint the —— day of

¹Id.

²Acme Copying Co. v. McLure, 41 Ill. App. 397, 399; Craig v. McKinney, 72 Ill. 305; Jewell v. Rock River Paper Co., 101 Ill. 57; Union Mut. Life Ins. Co. v. Slee, 123 Ill. 57, 12 N. E. 543; Knapp v. Burnham, 11 Paige, 330, 338; Strang v. Allen, 44

Ill. 428; King v. Bryant, 8 M. & C. 191; Fergus v. Chicago Sash & Door Co., 64 Ill. App. 364. See also 3 Daniell, Ch. Pr. (1st ed.) pp. 804, 805; Id. (6th ed.) 1175.

³Brundage v. Goodfellow, 8 N. J. Eq. 513, 517. See Ch. Rules 1901, No. 22.

— at — in the — noon, at my office in the village of —, to consider the matter referred. At which time and place all parties concerned are to attend.

Dated the — day of —, A. D. 1902.

A. B., Master in Chancery.

Underwriting: To proceed with the taking of the evidence.¹

This underwriting was necessary to apprise the party as to the nature of the proceedings to be had in the master's office. This information had to be thus given or else in the body of the summons, as we shall see later on. This method was formerly generally practiced in this country.

New York Chancery Rule 100 provided for issuance of a summons by the master, and that it should "be served" on the adverse party or his solicitor such time previous to the day appointed for hearing as the master may deem reasonable and direct; taking into consideration the nature of the matters to be examined and the residence of the parties." It further provided that such summons should be served at least two days before the hearing, if the party resided in the town or city where the hearing took place, and not less than four days if he resided elsewhere.

United States Equity Rule 75 provides simply that the master shall, upon a reference, assign a time and place for proceedings and give due notice thereof to each of the parties, or their solicitors, without specifying whether it shall be by warrant or by an ordinary notice. Therefore either is proper. The practice of giving notice by warrant may still be pursued in all cases if the master sees fit so to do, but the practice now generally followed is for the "party prosecuting the reference to obtain from the master a simple appointment of the time and place, and thereupon to serve an ordinary notice of hearing upon the adverse attorney, and in case of his failure to attend proceed with the reference *ex parte*."²

§ 189. Method of giving notice — Its sufficiency and form — Continued.— But, whichever course is pursued, such notice

¹ Bennett's Pr. in Master's Office, 1170, and note; Manhattan Co. v. 125; Hoffman, Masters in Ch. 887; Evertson, 4 Paige, 276.

Barbour, Ch. Pr. 478; Daniell, Ch. Pr. ² 1 Van Santvoord, Eq. Pr. 525.

must be sufficient, both in substance and in form, to answer the purpose intended:

First. This notice, like most notices required in practice, should be in writing and properly signed.¹

Second. This written notice must accurately set out the *time* and *place*.²

Third. There must be enough in the body of the notice to apprise the party of the nature of the proceedings which are to be had before the master.³ If a party is in fact misled by the character of the notice, and by reason thereof fails to attend, the report should be set aside and the cause re-referred.⁴ When notice is given by warrant or by summons, this information was contained in the underwriting, and, if not there, then it was necessary to give it in the body of the summons.⁵

Fourth. Where the parties to a suit, or interested in a fund, are so numerous as to render it an onerous duty to make personal service upon each, it is competent for the court, in the order of reference, to direct the master to give notice of the time and place of hearing by publication, the object being to avoid expense and delay.⁶

When the notice is by publication it will be sufficient if it gives the style of the suit, and states the time and place of the hearing, although it omits the names of the parties, especially where there is a great number of parties.⁷

§ 190. Method of giving notice — Its sufficiency and form — Continued.— The following forms are given:

Master's Warrant or Summons.

Circuit Court of the United States for the Southern District
of New York.

John Jones, Plaintiff,	} In Equity.
v.	
Richard Roe, Defendant.	

In pursuance of the authority contained in a decretal order

¹ *Masterson v. Herndon*, 10 Wall. 416; *Larrabee v. Morrison*, 15 Minn. 196; *Wade on Notice*, § 1209.

² *Martin v. South Salem Land Co.*, 94 Va. 28, 29, 83 S. E. 660; *Manhattan Co. v. Evertson*, 4 Paige, 276.

³ *Manhattan Co. v. Evertson*, 4 Paige, 276, 278.

⁴ *Id.*

⁵ 1 *Barbour Ch. Pr.* 478; *Manhattan Co. v. Evertson*, 4 Paige, 276.

⁶ *Martin v. South Salem Land Co.*, 94 Va. 28, 29, 26 S. E. 591.

⁷ *Martin v. South Salem Land Co.*, 94 Va. 28, 29, 26 S. E. 591.

made in this cause by the Honorable William J. Wallace, Circuit Judge, and the Honorable Nathaniel Shipman, District Judge, at a stated term of this court held at the United States court-house in the city of New York, on the 2d day of July, A. D. 1901, I, Cornelius Dewey, one of the masters of said court, do hereby summon you, John Jones, plaintiff, and Richard Roe, defendant, to appear before me, the said Cornelius Dewey, at my office at No. 111 Broadway, in the city and county of New York, in the southern district of New York, on the 3d day of January, A. D. 1902, at 2 o'clock in the afternoon, to attend a hearing before me, the said master, of the matters in reference in the said cause to be had by virtue of the decretal order aforesaid. And hereof fail not at your peril.

Dated this the 28th day of December, A. D. 1901.

CORNELIUS DEWEY, Master.

Underwriting: To take the account in said cause.

CORNELIUS DEWEY, Master.

To John Jones and Richard Roe.¹

General Notice of Proceedings before Master.

Circuit Court of the United States for the Southern District
of New York.

John Jones, Plaintiff,	} In Equity.
v.	
Richard Roe, Defendant.	

To James K. Walker, Counsel for Plaintiff:

By virtue of an order of reference in the above stated case, I do appoint Saturday, the 4th day of September, A. D. 1901, at 10 o'clock A. M., at my office, room 10, No. 27 Wall street, in the city and county of New York, to consider the matters thereby referred to me, at which time and place all parties concerned are to attend.

Dated this the 24th day of August, A. D. 1901.

CORNELIUS DEWEY, Master.

§ 191. Length of time required.— We have already seen that notice to all parties interested is required as to all matters affecting their interests, and that such notice must be sufficient in substance and form. In addition to this sufficient time must be given, otherwise the object of notice would be defeated. In estimating the length of time required, three things must be taken into consideration:

First. Time for consultation between attorney and his client.

¹ From Beach, Modern Equity Practice, vol. 2, p. 1307.

Second. Time for counsel to prepare for the matter to be considered upon the hearing.

Third. Reasonable time for the attorney to get to the master's office, considering the distance necessary to be traveled without using extraordinary diligence.¹ What is a reasonable notice to appear before a master, when not fixed by statute or any exact decision, depends upon the circumstances of each case, and is left to the discretion of the commissioner. Notice to appear on the day the case was referred, between 8 and 12 o'clock P. M., was held to be so unreasonable that the report was set aside.² Where an attorney, who was served by mail, resided in a distant city, and who could not have more than reached the master's office by the day, had there been no delay in the mail or otherwise, and the attorney had been at home and left at once to attend, the notice was held to be insufficient. The object of requiring notice is that parties may be heard in defense of their rights and not as a mere form.³ In another case, the notice of three days only, was held to be too short, but, as the defendant did not object on that ground in the court below, or show that any injustice or injury resulted thereby, the upper court refused to disturb the decree on that ground.⁴ Only a few hours' notice was held to be clearly insufficient.⁵ So, too, a notice given on the 10th, of a hearing to be had on the 12th of the same month, was held not to be a reasonable notice.⁶ Of course a notice which is not served until after the hour for hearing is ineffectual for any purpose whatever, either as to the date named or the date to which the hearing is adjourned. Such a notice is equivalent to no notice at all.⁷

Fourth. Where a statute or rule of court requires such notice to be served a given time before the hearing, such statute or rule of court must be strictly complied with, otherwise the whole proceedings may be set aside, unless the party, by his appearance without objection, has waived the error.

For example, by a chancery rule in Michigan it is provided

¹Strang v. Allen, 44 Ill. 428; Wade on Notice, § 1204.

²Bernie v. Vandever, 16 Ark. 616; Dan. Ch. Pr., vol. 2, p. 1170, note.

³Strang v. Allen, 44 Ill. 428, 434.

⁴Moore v. Bruce, 85 Va. 189, 143, 7 S. E. 195.

⁵Bernie v. Vandever, 16 Ark. 616.

⁶Parsons v. Able, 19 Tex. 447.

⁷Le Baron v. Overstreet, 39 Fla. 628, 23 So. 22.

that "at least four days' notice shall be given by each party of the time and place of taking testimony" before a court commissioner.¹ New Jersey Chancery Rule No. 44 requires the party obtaining the reference to serve the adverse party, at least four days exclusive of the day assigned for the hearing, with a summons issued by the master, requiring his attendance at such time and place, and make proof thereof to the master. The rule seems to be different where a cause is referred to a vice-chancellor or an advisory master for trial. Another rule provides that, when a cause referred to an advisory master or vice-chancellor shall be at issue, either party may, upon five days' notice to the other parties, apply to the vice-chancellor or advisory master to whom the cause is referred to fix a time and place for the hearing thereof; and upon such application, such vice-chancellor or advisory master may designate such time and place; and upon fifteen days' notice, in writing, of the time and place so designated, the cause may be heard.² So, too, in Alabama, it is provided by Chancery Rule No. 92. that: "Where a reference is executed during term time, one day's notice must be given to the parties entitled, unless waived, and, when executed in vacation, at least five days;" while in Georgia it is provided by the Code, sec. 4584, that upon a reference, the auditor "shall give both parties or their counsel reasonable notice of the time and place of hearing."

Fifth. Sometimes the order of reference itself directs the mode in which the notice of the time and place of the hearing shall be given. In such case, of course, the master or commissioner must follow the terms of the order, unless the party complaining waives the error by his appearance.

§ 192. How notice may be served.—The next step in the proceeding is to make proper service of the warrant or summons.

First. This service should invariably be by delivering a copy of the warrant or notice to the party to be served. This is not absolutely necessary, but is far better than by reading.

Second. It is not necessary to serve a copy of the order of reference, but, where proceedings are to be had under an order of reference to a master, it is sufficient that the defendant have

¹Stevens' Revised Rules, No. 14. ²N. J. Ch. Rules, Nos. 195, 201, See Whipple v. Stewart, Walk. Ch. 357. 202.

proper notice of the time of the hearing. The master must have a copy of the order to base his proceedings upon, but there is no good reason for requiring a copy to be served on the defendant. He is bound to take notice of the entry of an order at his peril, and, if he has not seen it before, he will have an opportunity of seeing and examining it in the master's office, and of ascertaining what it requires of him. The order is to be executed in the presence and under the direction of a master; and in this respect differs materially from an order requiring a party to do some act without the intervention of a master, as to put in an answer within a specified time, or the like.¹

Third. It is not necessary that the warrant or notice should be served by a marshal, sheriff or other officer, but may be served by any disinterested person.²

A notice may be served by mail.³ But service by this mode cannot have the same coercive effect as personal service,⁴ as a party may always show by affidavit that he did not receive the notice. A registered letter, however, would avoid this difficulty. It is immaterial in what manner service is had, so actual receipt of notice can be shown.⁵

Fourth. Service may be had upon the party interested or upon his attorney, if he has one;⁶ but in all interlocutory matters arising in the progress of a suit in court, notice should be served on the attorney of the party, if he has one.⁷

So, too, personal service of the summons upon the party himself, to attend before the master and to produce or execute papers, or to be examined, under a decree or order of the court, is not necessary for the purpose of bringing such party into contempt for disobeying the summons; but a service upon his solicitor is sufficient.⁸ Service upon the attorney should be had in all cases, because the attorney, ordinarily, will better understand the nature and importance of the matter. Service of a notice by putting it under the attorney's door, and taking

¹ Whipple v. Stewart, Walk. Ch. (Mich.) 357.

² Kerosene Lamp Heater Co. v. Fisher, 1 Fed. 91.

³ Id.

⁴ Wade on Notice, § 1355.

⁵ Wade on Notice, § 1337.

⁶ United States Eq. Rule, 75.

⁷ Bailey v. Wright, 24 Ark. 73; Rivers v. Walker, 1 Dal. 85; Nash v. Gilkeson, 5 S. & R. 352; Newlin v. Newlin, 8 S. & R. 41; Hutcheson v. Johnson, 1 Bin. 59; Wade on Notice, § 1321.

⁸ Merritt v. Annan, 7 Paige, 151.

no further care to see that it is received, is insufficient. A notice served in an improper manner cannot be invalidated, provided it was received in due time.¹

§ 193. Want of or sufficiency of notice — How question is raised.— Where a party is not served with notice, or is served with an insufficient notice and desires to question the correctness of the master's action in this regard, it is necessary:

First. He must not have waived his right to object by appearing before the master.

If a party appears and raises no question as to the sufficiency of the notice, but on the contrary participates in the hearing, he is estopped from ever afterward objecting on the ground of the insufficiency or want of notice. The object of a notice is to give the party the privilege of appearing if he so desires. When he appears voluntarily and takes a part in the hearing without objection to the form or even absence of notice, all that was intended to be accomplished by formal notice has been secured, as effectually so as if he had appeared, filed a formal waiver of notice and participated in the hearing.² Attendance in person or by counsel and a failure to object to the insufficiency of or want of notice constitutes a waiver of such objection.³ An appearance on defective notice and asking and obtaining an adjournment is a waiver of such defect.⁴ If a party desires to contest the sufficiency or want of notice he must, if he appears at all, limit his appearance solely for the purpose of raising such objection.⁵

Second. The proper method of presenting the question to the chancellor is as follows:

If a party has had no notice or an insufficient notice of proceedings before the master, and desires to raise the question, he should not do it by exceptions, but by a motion to set aside the report and recommit it to the master.⁶ It has been held

¹ *Burdett v. Lewis*, 7 C. B. (N. S.) 791; *Wade on Notice*, § 1338.

² *Brinton v. Hogue*, 172 Pa. St. 366, 33 Atl. 534; *Gay Manufacturing Co. v. Camp*, 13 C. C. A. 137, 139, 65 Fed. 794, 796; *Prince v. Cutler*, 69 Ill. 267; *Taylor v. Taylor*, 52 Ill. App. 527, 531.

³ *Harding v. Wallace*, 8 B. Mon. (47 Ky.) 536.

⁴ *Wetter v. Schlieper*, 7 Abb. Pr. (N. Y.) 92.

⁵ *Cassidy v. Knapp*, 167 Pa. St. 305, 31 Atl. 638.

⁶ *Hall v. Westcott*, 17 R. L. 504, 23 Atl. 25; *Deimel v. Parker*, 59 Ill. App. 426; *McMannamy v. Walker*, 63 Ill. App. 259; *Douglas v. Merceles*, 24 N. J. Eq. 25; *Tyler v. Simmons*, 6

in Michigan that the service of a master's summons without showing the original, but only served by copy, is insufficient, and that the defendant was not bound to appear before him. Under such circumstances the proper course is for the defendant to enter a motion before the court to set aside any order made by the master under such defective notice, and also obtain an order staying proceedings before the master until he can get his motion heard.¹ In some cases, however, the courts have permitted the question to be raised by exception on the coming in of the master's report;² but this would be contrary to the rule, which is well established, that exceptions only lie to erroneous findings of the master upon issues submitted to him by the order of reference, and that all irregularities arising in the progress of a reference must be corrected on petition or by a motion to re-refer the matter to the master.³

Third. The motion to re-refer the cause to the master for the want of notice, or because of an insufficient notice, must be supported by an affidavit stating the facts, unless they appear from the report of the master, and such affidavit is insufficient if it only denies service on the party, because service may be had on his attorney. Such affidavit must negative the fact of service on both attorney and client.⁴ So, too, where a notice is by publication, an exception by a party on the ground that personal service was practicable, will not be entertained, unless the party supports his exception by affidavit that he had no such information of the proceedings as would have enabled him to attend before the master.⁵

§ 194. What the record must show.—The master cannot be too particular in the preservation of the evidence of the

Paige, 127; Lewis v. Godman, 129 Ind. 359, 27 N. E. 563; Emerson v. Atwater, 12 Mich. 314; Schwarz v. Sears, Walker (Mich.), 19; Ward v. Jewett, Walk. (Mich.) 45; Pierce v. Faunce, 53 Me. 851; Herrick v. Belknap, 27 Vt. 678.

¹ Howard v. Palmer, Walk. Ch. (Mich.) 391.

² Shaffner v. Healy, 57 Ill. App. 90; Whiteside v. Pulliam, 25 Ill. 285;

White v. Johnson, 2 Munf. 285; M'Candlish v. Edloe, 3 Gratt. 330, 333.

³ As to whether irregularities of this character should be corrected by exception or on motion, see, further, this chapter, *post*, §§ 313-323, 427-431.

⁴ Whiteside v. Pulliam, 25 Ill. 285.

⁵ M'Candlish v. Edloe, 3 Gratt. 330, 333.

due service of notice on each and every party entitled to appear on a reference before him. This should be done in justice to the parties and for the protection of the master himself. In case a party entitled to notice does not attend, and the master's report fails to show service of notice, the court may be forced to re-refer the cause, and it may be necessary to do the work all over again. For this reason every warrant or notice should be returned to him with proof of service. This proof may be made:

First. If served by a marshal, or other officer, by his return upon the same.

Second. If served by a private individual, then by acknowledgment of service duly signed by the party upon whom it is served, or by the affidavit of the party making the service.

This notice and proof of service should be carefully preserved and returned into court with the master's report.¹ Not only is it the duty of the master to see that all parties entitled to notice are duly summoned, and to preserve the notices with proof of service, but his report itself should show this fact.² Where a party who is entitled to appear before the master, in fact does not appear, the report must show on its face that such party was served with due notice.³ Where the master's report stated that he "gave reasonable notice to each and all of the said defendants," it was held to be sufficient.⁴ The report of the master must show notice properly served, and if adjourned meetings are had without further notice to the party, or waiver of notice by his appearance, then the master's minutes must show each adjournment, otherwise the master will lose jurisdiction of the party. If an adjourned meeting is held without the record showing that it was held in pursuance of an adjournment at a previous meeting, and fails to show the appearance of the party or service of a new notice, the chancellor, on motion, must set the report aside and re-refer the cause.⁵

¹ *Holt v. Holt*, 87 W. Va. 805, 16 S. E. 675.

² *Hulbert v. McKay*, 8 Paige, 651; *Franklin v. Van Cott*, 11 Paige, 180; *De Ruyter v. St. Peter's Church*, 2 Barb. Ch. 555.

³ *Hulbert v. McKay*, 8 Paige, 651, 653; *Franklin v. Van Cott*, 11 Paige, 129.

⁴ *State v. McIntyre*, 53 Me. 214.

⁵ *Rice v. Schofield*, 9 N. Mex. 814, 51 Pac. 573.

§ 195. **Effect of failure to appear.**—A party having been regularly notified of a hearing or proceedings in the master's office, if he has anything to offer in his own behalf, must attend and present the same. If he has proof to offer, it is his duty to appear and offer it. If he fails so to do the master may make up his report, and, in such a case, it is not error for the court to refuse to re-refer the cause to enable him to present his evidence.¹ One who has had due notice and fails to appear has no remedy,² for the master may proceed *ex parte*. If it were otherwise the parties could, simply by failing to appear, prevent the order of reference from being executed at all. This has been the rule for centuries. The master being shown an order of reference, and the party who shows it requesting, he grants his warrant or summons, whereby he appoints a time and place for the parties to attend him thereon (when and where they may come with their counsel, clerk or solicitor, as they see cause), which being served on the adverse party, his clerk or solicitor, by showing it, and delivering a copy, and if he attended not the master granted a second summons, when if he attended not the master made his report *ex parte*.³

This power to proceed *ex parte* is usually provided for by a rule of court, but exists independently of any such rule. United States Equity Rule 75 provides that the master shall give due notice of the time and place of hearing, "and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment."⁴ So, also, it is provided by a chancery rule in New Jersey, "that if the party summoned shall not appear, or good cause shall not be shown why he does not, the master may proceed *ex parte*; and if the party serving the summons shall not appear at the time and place, or show cause why he does not, the master may either proceed *ex parte*, or the party obtaining .

¹ Gould v. Elgin City Banking Co., 36 Ill. App. 390, 136 Ill. 60, 26 N. E. 497.

² State v. McIntyre, 53 Me. 214.

³ Pr. Reg. Ch. 364.

⁴ Florida Equity Rule 24 contains this provision in precisely the same language; in fact, paragraph 77 of this rule is identical with United States Equity Rule 75.

the summons, and not appearing, shall lose the benefit of the reference, at the option of the other party."¹

Similar rules exist in most other jurisdictions. Sometimes this matter is provided for by statute. For example, in Alabama it is provided by the code, sec. 742, that, upon a reference, the register must assign a time and place for proceeding therein and give reasonable notice to each of the parties or their solicitors; and if either party fail to appear at the time and place appointed, the register may proceed *ex parte*, or, in his discretion, adjourn the examination to another day, giving notice to the adverse party, or his counsel, of such adjournment.

VIII. PROCURING THE ATTENDANCE OF WITNESSES.

§ 196. Attendance of witnesses — How procured.— The attendance of witnesses upon a reference to a master is procured in precisely the same manner as upon a hearing in court, that is, by service of a subpoena; the only difference being that in some cases the statute or a rule of court requires the subpoena to be issued by the clerk, and in others to be issued and signed by the master. United States Equity Rule 78 provides that witnesses who live within the district may be summoned to appear before a master by subpoena in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the master, requiring the attendance of the witnesses at the time and place specified. So also New York Chancery Rule 76 provided that process of subpoena to compel the attendance of witnesses before a master should issue of course, and the time and place of attendance should be specified in the writ. Michigan Chancery Rule 14, § e, makes precisely the same provision as in the above New York rule.² Under the above rules the attendance of witnesses before the master is compelled by a subpoena issued by the clerk under the seal of the court, and not by a summons from the master. In Indiana it is provided by statute that master commissioners shall have the power to issue subpoenas to compel the attendance of witnesses before them.³ In Ohio a master commis-

¹ N. J. Ch. Rule 43.

² Burns' Annotated Stat., § 1465.

³ Stevens' Rules, p. 128.

sitioner is authorized by statute to summon and enforce the attendance of witnesses;¹ and in Georgia it is provided by the Code, section 4583, that the auditor shall have power to subpoena and swear witnesses.

The rules of court generally prescribe the limits within which a witness may be compelled to attend by subpoena. Thus, United States Equity Rule 78 provides that witnesses "who live within the district" may be compelled to attend before the master. New York Chancery Rule 76 limited the distance within which a witness might be compelled to attend to forty miles; while Michigan Chancery Rule 14 limits the distance to not "more than one hundred miles from his place of residence, unless by special order of the court." Similar limitations will be found in most of the rules of courts relative to compelling the attendance of witnesses. When the evidence of a witness is required who lives beyond the prescribed limit, it must be obtained, of course, by the usual method, that is by deposition. In the United States circuit court this is done under rule 77, which provides a commission to be issued upon the master's certificate from the clerk's office. In case persons have in their possession documents, books or papers which are necessary to be used in evidence, they may be compelled to produce the same by subpoena *duces tecum*. Since the passage of the law authorizing the examination of parties to the suit as witnesses, there is no difference between them and any other witnesses as to the method of bringing them into court or their examination.² Of course they may be compelled to produce books, documents and papers in their possession by subpoena *duces tecum*, the same as any other witness.³

§ 197. Attendance of witnesses — How procured — Continued.— The effect of failure to attend upon the master at the time and place named is the same whether the subpoena is issued by the clerk or by the master. This is usually provided for by the same rule of court authorizing the issuing of the subpoena; in either event it is a contempt of court. United

¹ Rev. Stat., § 5223.

² See post, §§ 205-208.

³ Cent. Nat. Bank v. Arthur, 2 Sweeny (N. Y.), 194, 198.

States Equity Rule 78 provides that if any witness shall refuse to appear or give evidence, it shall be deemed a contempt of court, which, being certified to the clerk's office by the master, an attachment may issue thereupon by order of the court or any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to giving testimony in the court. New York Chancery Rule 76 and Michigan Chancery Rule 14 provide that witnesses who, having been subpoenaed, fail to attend and submit to an examination, may be punished for contempt.¹ The statute of Illinois, in enumerating the powers of the master, among other things, vests in him the authority "to compel the attendance of witnesses."² Under this authority masters in chancery in that state are in the habit of issuing subpoenas to compel the attendance of witnesses on hearings before them. It is very doubtful, however, whether this is authorized by the statute referred to; in other words, if a witness should refuse to attend under such a subpoena, it is very questionable whether he could be attached for contempt of court. No provision, however, is made for issuing subpoenas by the clerk of the court. As a matter of fact masters in that state, when it is anticipated that their authority may be questioned, invariably advise counsel to obtain subpoenas from the clerk. United States Equity Rule 78 is more specific in its directions as to who shall issue subpoenas, providing that this may be done by the clerk of the court, yet masters in chancery of the circuit courts also are in the habit of issuing subpoenas for witnesses, signed by the master. They too, however, when trouble is anticipated in compelling obedience, advise the parties to apply to the clerk of the court for process. Judge Drummond, of the seventh judicial circuit, in an unreported case, a good many years ago, declined to commit a witness for contempt in refusing to obey a subpoena issued by a master, holding that such process was without authority, that all process of a court must be authenticated by its seal, and that the clerk, who alone was custodian of such seal with a right to use it, was the only officer authorized to issue a subpoena, and that a subpoena issued by a master was, therefore, void. It may be said that the reasoning of the judge proves

¹ See *post*, §§ 880-885.

² Rev. Stat., ch. 90, § 6.

too much, because, from time immemorial, masters have issued their warrants, signed by them, requiring the defendant to appear before them for the purposes named therein; but the answer is that, ordinarily, this warrant is but a notice to the party of the time and place of proceedings in the master's office, while, in other cases, where the party is ordered to appear before the master for examination, or to deposit books, papers, and documents, the master's warrant is but a notice of the terms of the order of reference, and, if the party fails or refuses to perform the act required, he is guilty of contempt, not for disobeying the master's warrant, but for refusing to comply with the order of court. . A form of subpoena is given below, as they are constantly used by masters, and their authority not questioned in one case in a thousand.

Master's Subpœna.

STATE OF ILLINOIS, }
County of Cook. } ss.

The People of the State of Illinois, to Samuel A. Black:

You are hereby commanded to appear before me, at my office, room 526, 112 Clark street, in the city of Chicago, in said county, on the 12th day of June, A. D. 1902, at 10 o'clock A. M., then and there to testify the truth, in a suit wherein Alexander H. Berry is complainant and Charles K. Brown *et al.* are defendants; and this you shall in no wise omit, under the penalty of the law.

Given under my hand, this 26th day of May, A. D. 1902.

JOHN L. BAKER,
Master in Chancery of the Superior
Court of Cook County, Illinois.

A subpoena may be served by any person, but, if served by a private individual, an affidavit of service should be attached thereto.¹ It is not true in Indiana that any person may serve a subpoena issued by a master, it being provided by the code that such subpoenas must be served by the sheriff or constable.²

IX. PRODUCTION OF BOOKS AND PAPERS.

§ 198. Master's authority and how exercised.—One of the most important subjects with which a master has to deal is the production of books, papers and documents to be used in evidence in cases of references before him, and the proper

¹ For form of this affidavit see *post*, § 199.

² Burns' Annotated Stat., § 1466.

method of using the same. Without the power to compel the production of evidence of this character, the object of a reference in many instances, especially in cases of complicated accounting, would be defeated. The importance of the subject in the administration of justice, the great inconvenience, frequently resulting in the parties interested in being compelled to bring into the master's office voluminous books necessarily used in recording daily business transactions, and the limitations with which the law circumscribes the power of the master to prevent its abuse, will be here discussed, leaving the proper method of the introduction and use of this class of evidence to its more appropriate place in a future section.¹

Notwithstanding United States Equity Rule No. 77 provides that the master, upon every reference to him, shall have full authority to require the production of all books, papers, writings, vouchers, and other documents applicable thereto, yet, in all cases where it is necessary to require the production of such matters for examination, or to be introduced in evidence, it is better to do so by the insertion of a provision to that effect in the order of reference. This is the better course, for the reason that the equity rule above referred to, while it confers the power upon the master, it makes no provision as to the method to be followed by the master compelling their production, leaving it in doubt as to whether this may be done by warrant or summons as under an order of court to produce, or by subpoena *duces tecum*. When the latter course is pursued, and matters are brought in by subpoena, they are not subject to the control of the master, but must, if he requires it, remain in the possession of the witness. For these reasons, as stated above, the better course, where it is sought to compel the production of books, papers, and other documents, is to invoke the power of the court through the order of reference.² The practice in the enforcement of this order is as follows: Upon carrying the order of reference, or a certified copy, into the master's office, by a solicitor of the complainant, upon request, the master issues his warrant, or summons, with that part of the order to produce either underwritten or inserted in the body thereof.

¹ See *post*, §§ 246-248. ² For the form of this order see *ante*, §§ 155, 156.

§ 199. Master's authority and how exercised — Continued.— The form of this warrant may be as follows:

Warrant to Produce.

In the Circuit Court of the United States for the Northern
District of Illinois, Northern Division.

George M. Baker, Plaintiff,	} In Chancery.
v.	
Alexander A. Hart <i>et al.</i> , Defendant.	

In pursuance of the authority and directions contained in an order of reference, made in the above cause by the said court, I, the undersigned, master in chancery of said court, do hereby summons you, Alexander A. Hart, defendant in the above cause, to appear before me at my office, No. 100 Washington street, in the city of Chicago, on the 12th day of June, A. D. 1902, at 10 o'clock in the forenoon, to attend a hearing of the matters in reference before me, as aforesaid, in the said cause, to be had by virtue of the said order of said court, and hereof you are not to fail at your peril.

Dated this the 4th day of June, A. D. 1902.

IRA S. HOWARD,

Master in Chancery of the Circuit Court of the United States,
for the Northern District of Illinois, Northern Division.

Underwriting: At which time and place you, the said defendant, are to produce before me, and deposit in my office, all such deeds, books, papers, etc. [*here follow the words of the decree*].¹

STATE OF ILLINOIS, ss.

James K. Hardin, being first duly sworn, says that on the 4th day of June, A. D. 1902, he served a true copy of the within summons and underwriting upon John C. Brown, solicitor of the above named Alexander A. Hart, by delivering the same to him, at the same time showing the original.

JAMES K. HARDIN.

Subscribed and sworn to before me this the 4th day of June, A. D. 1902.

WILLIAM T. BAILEY,

Notary Public.

§ 200. Master's authority and how exercised — Continued. Under the English practice the notice to produce was underwritten as above, but it may be and usually is, in this country, written in the body of the warrant. Thus where a defendant is ordered to appear before a master for examination and also

¹ Adapted from Hoffman's *Masters in Chancery*, 527, and Bennett's *Master's Office*, 78.

ordered to produce books, papers and documents, the warrant may be in the following form:

Warrant to Appear for Examination and to Produce.

In the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

George M. Baker, Plaintiff, .

v.

Alexander A. Hart *et al.*, Defendant.

} In Chancery.

In pursuance of the authority and directions contained in an order of reference, made in the above cause by the said court, I, the undersigned, master in chancery of said court, do hereby summon you, Alexander A. Hart, defendant in the above cause, to appear before me, at my office, No. 100 Washington St., in the city of Chicago, on the 12th day of June, A. D. 1902, at 10 o'clock in the forenoon, to be examined on oath touching certain matters and things set forth in the bill of complaint filed in said court, at which time and place you, the said defendant, are to produce before me, and deposit in my office, all such deeds, books, papers, etc. [*here follow the words of the decree*], and hereof you are not to fail at your peril.

Dated this the 4th day of June, A. D. 1902.

IRA S. HOWARD,

Master in Chancery of said Court.

I served the within master's summons by reading the same personally to and in the presence and hearing of Alexander A. Hart, therein named, on the 4th day of June, A. D. 1902.

Marshal's Fees:

JOHN DOE, U. S. Marshal.

— Service, —.

By RICHARD ROE, Deputy.

— Miles, —.

In case the warrant is served by a private individual an affidavit of service should be attached.

STATE OF ILLINOIS, ss.

James K. Hardin, being first duly sworn, says that on the 4th day of June, 1902, he served a true copy of the within summons upon John C. Brown, solicitor of the above named Alexander A. Hart, defendant, by delivering the same to him, at the same time showing the original.

JAMES K. HARDIN.

Subscribed and sworn to before me this 4th day of June, A. D. 1902.

WILLIAM D. BAILEY,
Notary Public.

It is not necessary to serve the copy of the order of reference, as the defendant, being in court, is bound to take notice of its provisions.¹

¹ As to service of this warrant, see *ante*, § 192.

Upon the return day of this warrant the party upon whom it is served, either:

First. Produces the books, papers and documents in the master's office and deposits them with the master; or,

Second. He appears before the master and asks for further time; or,

Third. He appears before the master and offers to allow the inspection of the books, etc., on the ground that it would be very inconvenient or work a hardship to require their deposit in the master's office; or,

Fourth. He fails to appear at all, or, appearing, declines or refuses to produce the books or documents called for.

§ 201. Master's authority and how exercised — Continued. If a party is directed by the decree referring a cause to the master to bring into the master's office all books, papers, etc., in his custody relating to a particular matter, when he leaves them he should make an affidavit that they are all that are in his custody or power, or that he ever had.¹ This affidavit may be in the following form:

Affidavit on Leaving Books, Papers, etc.

STATE OF ILLINOIS, {	ss. In the Superior Court of Cook County.
County of Cook. }	
John Jones, Complainant,	} In Chancery.
v.	
Henry M. Taylor, Defendant.	

Henry M. Taylor, defendant in the above entitled cause, makes oath and says that neither he, this deponent, nor any other person or persons for his use, to his knowledge or belief, nor with his privity or consent, have or has or ever had in his or their custody or power any deeds, books, papers or writings relating to the matter in question in this cause, save and except the several deeds, books, papers and writings mentioned and contained in the schedule hereunder written, and also save and except, etc. [*Here state any other exception or qualification that may be necessary.*]

HENRY M. TAYLOR.

STATE OF ILLINOIS, {	ss.
County of Cook. }	

Henry M. Taylor, being first duly sworn, on oath says that

¹ 1 Newland's Ch. Prac. 327.

the matters and things stated in the foregoing affidavit are true to the best of his knowledge and belief.

HENRY M. TAYLOR.

Subscribed and sworn to before me this 10th day of June,
A. D. 1902.

WILLIAM T. BAILEY,
Notary Public.

Schedule referred to in the foregoing affidavit:

Two Ledgers marked respectively A. and B.

One Day Book marked C., etc.

[*Here set out the whole of the deeds, books, papers, etc.*¹]

Where the party is directed to produce books, papers, etc., before the master, and where such master is to superintend the production and delivery thereof, or a party is to produce "before a master," or "under the direction of a master," it is proper that all parties interested in the production may have an opportunity to examine whether the order is fully and fairly complied with; and, for the benefit of such parties who did not have such opportunity, it is the duty of the master to adjourn for a reasonable time to enable the complainants to examine the papers, books, etc., and that they may examine the defendants on written interrogatories, or orally, as the master shall think proper.² When a party is ordered to produce such books, papers and writings as the master shall direct, the usual affidavit accompanying the same is not conclusive proof that the party has fully complied with the order. Parties are to be given a reasonable time to examine the books and papers, and, if not satisfied, they then have the right to examine the party producing the same fully on the subject, either orally or upon written interrogatories, as the master shall think fit;³ and if, after such examination, the master, or any party interested, is still dissatisfied with the production of books, papers and other matters made in obedience to the order of court, the master should certify the default to the court, that further action may be taken in the matter.⁴

§ 202. Master's authority and how exercised — Continued — Master's discretion.—English Chancery Order of 1828, No. 60, provides as follows:

"That where by any decree or order of the court, books,

¹ Bennett, Master's Office, Appendix No. 13; ² Smith, Ch. Pr. 435.

³ Hallett v. Hallett, 2 Paige, 432.

⁴ Newland's Ch. Pr., vol. 1, 827.

² Hallett v. Hallett, 2 Paige, 432.
See 1 Hoffman, Ch. Pr. 528.

papers, or writings are directed to be produced before the master for the purposes of such decree or order, it shall be in the discretion of the master to determine what books, papers, or writings are to be produced, and when and for how long they are to be left in his office; or in case he shall not deem it necessary that such books, papers, or writings should be left or deposited in his office, then he may give directions for the inspection thereof by the parties requiring the same, at such time and in such manner as he shall deem expedient."¹ This English Order No. 60 is still in force in the chancery courts in this country.² It is in the discretion of the master to order the books deposited in his office or to have them brought in from time to time for inspection, allowing the owner to retain them in his possession in the meantime. This is a matter that the court will not interfere with.³ Under the above English Chancery Order it was in the discretion of the master to determine what books, papers or writings were to be deposited in his office, and also, where he deemed it unnecessary to require the books to be deposited in his office, that he might give directions for the inspection thereof by the parties at such time and in such manner as he should deem expedient.⁴ But, in the absence of any such rule of court, the usual provision inserted in the order of reference requiring the production of all books, papers or writings, as the master shall direct, vests the master with power not only to determine what books shall be produced, but also carries with it the power to determine the manner of their inspection, that is, whether the books are to be deposited in his office, or whether they are to be brought there from time to time for inspection as he shall direct.⁵

It may be and frequently is very inconvenient, and sometimes embarrassing, to the managers of a corporation to require its books and papers to be taken from its office and exhibited,

¹ 1 Smith, Ch. Pr. (ed. 1834), 566. New York Chancery Rule 103 was a substantial copy of the above order.

² *Ante*, §§ 167-171.

³ Nelson v. Gray, 2 Chy. Cham. (Canada), 454; Henna v. Dunn, 6 Mad. 340; In re Parish of Llantrisant, 1 Russ. & Myl. 25.

⁴ See In re Parish of Llantrisant, 1 Russ. & Myl. 25; Sidden v. Liddiard, 1 Sim. 388; Shirley v. Earl Ferrers, 1 Myl. & Cr. 304.

⁵ Sidden v. Liddiard, 1 Sim. 388; Shirley v. Earl Ferrers, 1 Myl. & Cr. 304.

to third persons, but it is also inconvenient, and often onerous to individuals to require them to do the same thing; but considerations of inconvenience must give way to the paramount right of litigants to resort to evidence which it may be in the power of witnesses to produce, and without which grave interests might be jeopardized, and the administration of justice thwarted.¹ If the books are in daily use so that they cannot be deposited with the master without interruption of business, or at least great inconvenience, this fact should be shown to the master by affidavit, and he can then make such order relative to their inspection as to produce the least inconvenience. In the absence of any such affidavit the proper order is to produce the books, sealing up such portions as do not relate to the matters in dispute, the defendant "pledging himself by affidavit not to seal up anything that does relate to the plaintiff."² Where books are in constant use, and the party required to produce them offers to allow them to be inspected in his counting house, the master should not require them to be left in his office, in the absence of any special reason for so doing.³ But the usual affidavit on production should be made, although the actual deposit of the books in the master's office is dispensed with.⁴ The master is the judge of the necessity or propriety of depositing the books, or permitting an inspection elsewhere. If he certify, therefore, that the party has not produced them, the court will not look at the excuse of a proffer of inspection in another place.⁵

§ 203. Master's discretion — Continued.— It must be constantly kept in mind that it is only for the purpose of using books as evidence upon issues already made up that their pro-

¹ Wertheim v. Continental Ry. & Trust Co., 21 Blatchf. 246, 15 Fed. 716.

² Gerard v. Penswick, 1 Wils. Ch. 222.

³ Re Ross, 8 P. R. (Ontario), 86.

⁴ Id.

⁵ Henna v. Dunn, 6 Mad. Rep. 340. This case was, before the new English order (the 60th), similar to 103 New York rule. The usual clause had been inserted in the decree, to produce books as the master should

direct. The defendant brought them in, offered to produce them whenever required, and also to permit an inspection at the solicitor's office when the plaintiff chose. It was insisted that they should be deposited. The master was of this opinion, and certified the non-production. The vice-chancellor held it was in his discretion, and refused to interfere. See 1 Hoffman, Ch. Pr. 527, and note.

duction can be required in the master's office. There is no power known to a court of chancery by which a party can be required to produce books and documents in advance in order to enable his adversary to frame his pleadings.¹ An Illinois statute provides that "the several courts shall have power, in any action pending before them, upon motion, and good and sufficient cause shown, and reasonable notice thereof given, to require the parties, or either of them, to produce books or writings in their possession or power which contain evidence pertinent to the issue."² The courts of that state hold that this only confers the right to order the production of the books on the hearing of the case, and that under it the court has no power "to take the books and papers of a party and impound them with an officer of the court for inspection or examination out of the presence of the court."³ Under this statute, when it is apparent that the object sought is the inspection of books by the plaintiff and his attorney out of court to make preparation for trial, the application for an order to produce books will be denied.⁴ In the discussion of this matter it is stated that "It will not be understood that the rule for the production of books before a master in chancery, in proper cases, is here sought to be stated."⁵ The court should never "compel the submission of the books of a party to general inspection or examination for fishing purposes, or with a view to find evidence to be used in other suits or prosecutions."⁶ No "fishing purpose will be tolerated."⁷ Matters of defense are property rights only to be disclosed at trial.⁸ The right to be protected against unreasonable seizures and

¹ *Paine v. Warren*, 83 Fed. 357; *Cutter v. Poole*, 52 How. Pr. 311; *Guyot v. Hilton*, 82 Fed. 743; *Whitman v. Weller*, 89 Ind. 515; 3 *Jacques v. Collins*, 2 Blatch. 23, Fed. Best on Ev., § 625; *Lester v. People*, Cas. 7,167; *Bischoffsheim v. Brown*, 150 Ill. 408, 420, 28 N. E. 387, 41 Am. St. R. 375.

² Rev. Stat., ch. 51, § 9.

³ *Lester v. People*, 150 Ill. 408, 419, 28 N. E. 387, 41 Am. St. R. 375.

⁴ Id.

⁵ Id.

⁶ Id.

⁷ *Opdyke v. Marble*, 44 Barb. 64; *Mott v. Ice Co.*, 52 How. Pr. 148;

⁸ 2 Phillips on Ev. 830, 588; *Lawrence v. Ocean*, 11 Johns. 241, 245; *Strong v. Strong*, 1 Abb. Pr. (N. S.) 233; 2 Starkie on Ev. 565; *Wharton on Ev.* 742, 744, 749; *Taylor on Ev.*, § 1586; *Lester v. People*, 150 Ill. 408, 418, 28 N. E. 387, 41 Am. St. R. 375.

searches is a constitutional one, and applies to the production of books and documents.¹

To justify an order compelling the production of books and documents three things are necessary:

First. It must be shown that the books contain material evidence; that they contain matter pertinent to the issue.²

Second. That they are in possession of the party upon whom the order of production is to be made.

Third. The books and papers must be specifically described.³

In all cases of accounting the master should require the production of all books and papers, "that by a full and patient examination he may be able to state, with accuracy and precision, the true state of accounts between the parties."⁴ An order for the production of books is not a final judgment and is not reviewable on appeal or error. The only method of testing the validity of such order is to "stand in defiance of the power of the court." Upon an attempt on the part of the court to enforce obedience to the order by the imposition of a fine, an order for execution, or by a definite term of imprisonment, the judgment of the court imposing such fine or imprisonment will be final, from which an appeal may be taken or to which a writ of error will lie.⁵

§ 204. Master's discretion — Continued.— The power to compel the production of books is one to be exercised with great caution. Before the court will exercise it a party must —

First. Show to the court precisely what books are required.

Second. It must be shown that the party against whom the order is made is a party to the suit.

Third. The order must be to produce such books as are in his possession or under his control.

Fourth. The court must be satisfied that the books called for contain evidence which is material to the matters in issue.⁶

¹ *Lester v. People*, 150 Ill. 408, 421, 23 N. E. 387, 41 Am. St. R. 875. papers, etc., in case of partnership accounting, see *Southworth v. People*, 183 Ill. 621, 622, 56 N. E. 407.

² *Lester v. People*, 150 Ill. 408, 418.

³ *Walker v. Bank*, 44 Barb. 39; *Lane v. Stebbins*, 9 Paige Ch. 622; *Case v. Banta*, 9 Bos. 595; *Morrison v. Sturges*, 26 How. Pr. 177; *Whitman v. Weller*, 89 Ind. 515.

⁵ *Lester v. Berkowitz*, 125 Ill. 307, 17 N. E. 706; *Blake v. Blake*, 80 Ill. 523; *Lester v. People*, 150 Ill. 408, 410, 23 N. E. 387, 41 Am. St. R. 375.

⁶ *Ringgold v. Jones*, 1 Bland (Md.), 88, 90.

⁴ *Brockman v. Aulger*, 12 Ill. 277. For a special order to produce books,

Should the books, papers or documents in a defendant's custody relate to other matters as well as to the matters in dispute in the cause, he will not be compelled to deposit them; but should attach to his affidavit *two schedules*, the one embracing such as relate solely to the matters in dispute; the other, such as relate to them as well as to other matters. The master will then permit parties to inspect the books and documents contained in the latter only so far as they relate to matters in dispute, allowing the party bringing them in to seal up such parts as relate to other matters.¹ Parties to a hearing before a master have the right to the production and examination only of such books and documents as are relevant to the issue or transaction under investigation; and where the same book contains entries pertinent to the matter under investigation and other matters which the party has no right to examine, it is the uniform practice to permit the party producing the books to seal up those parts which do not relate to the subject of litigation.² And if a party having the right of examination as to relevant matters breaks the seal and makes examination of matters not relevant, he will be guilty of a contempt of court and punished accordingly.³

Books and papers brought into the master's office should at all times be accessible for the general purposes of evidence, and should remain there as long as he may think any useful purpose may be answered by their so remaining, and then be re-delivered to the party bringing them in.⁴ If, upon the return of a warrant, or summons to produce, the party is not prepared to bring the required documents, he may apply for time to do so, according to the circumstances of the case; and, if these are very special, he may make his application to the court for further time. Thus, where a party admitted the books and papers to be in his possession though abroad (as in the West Indies), the court will order them to be brought in and deposited, giving reasonable time therefor.⁵

§ 205. *Subpœna duces tecum*.—Parties and others having in their possession books, documents or papers required to be

¹ Bennett, Master's Office, 80.

² *Dias v. Merle*, 2 Paige, 494; *Gerard v. Penswick*, 1 Wils. Ch. R. 222.

³ *Dias v. Merle*, 2 Paige, 494.

⁴ Bennett, Master's Office, 78.

⁵ Bennett, Master's Office, 78.

used in evidence before a master may be compelled to produce the same by subpoena *duces tecum*. Parties in suits in equity as well as in suits at law are now competent witnesses by statute, and may now be examined at the instance of their adversary. As a witness a party may now, therefore, be compelled by a subpoena *duces tecum* to produce books, documents and papers in his possession the same as any other witness. Parties were not competent witnesses at common law, and of course they could not be compelled to attend the trial by the writ of subpoena, or to attend and bring with them any books or writings in their possession which were pertinent to the issue, or which might tend to elucidate the matter in controversy, by the writ of subpoena *duces tecum*.¹ Such writ is a compulsory one, which the court has power to issue, and which the witness is bound to obey, and which will be enforced by proper process to compel the production of books, papers and documents, when the witness has no lawful or reasonable excuse for withholding them.² Such writ not only lies to compel the production of documents in the hands of third persons, but is a convenient method of compelling their production by the parties to the suit. Such party to a suit can be compelled by this writ to produce books, papers and documents in the master's office upon a reference. This is a convenient, efficient and proper method.³ The mere fact that the document called for and in the possession of the opposite party may be damaging as evidence against him, constitutes no excuse for refusing to obey the writ. So, too, the fact that it may disclose a valuable trade secret forms no excuse for withholding it.⁴ He is bound to obey the writ, and be ready to produce the documents called for in obedience thereto. Like any other witness, it is his duty to make reasonable search for the papers and documents called for; but, before he

¹ Merchants' Nat. Bank v. State Nat. Bank, 8 Cliff. 201, 202, Fed. Cas. 2448; Bischoffsheim v. Brown, 29 Fed. 341, 343; Murray v. Elston, 28 N. J. Eq. 212.

² Bull v. Loveland, 10 Pick. 9; Johnson Steel Street Rail Co. v. North Branch Steel Co., 48 Fed. 191.

³ Edison Elec. Light Co. v. United States Elec. Lighting Co., 45 Fed. 55; Murray v. Elston, 28 N. J. Eq. 212; Cent. Nat. Bank v. Arthur, 2 Sweeny (N. Y.), 194, 198; Campbell v. Knowles, 36 Leg. Int. 193.

⁴ Edison Elec. Light Co. v. United States Elec. Lighting Co., 45 Fed. 55.

can be compelled to exhibit their contents, he is entitled to appeal to the master, if any sufficient reason exists to protect him from a disclosure.¹ If the master decides against him he may appeal to the court for protection. The mere fact that a party or witness has been compelled to bring the documents called for into the master's office does not require him to admit them in evidence.²

§ 206. Subpoena duces tecum — Continued.—So, too, a corporation may be required to produce books and documents before the master by subpoena *duces tecum*. On principle it is impossible to suggest any reason why a corporation would be privileged to withhold evidence which an individual would be required to produce. It may be inconvenient, and sometimes embarrassing, to the managers of a corporation to require its books and papers to be taken from its office and exhibited to third persons, but it is also inconvenient, and often onerous, to individuals to require them to do the same thing. Considerations of inconvenience must give way to the paramount right of litigants to resort to evidence which it may be in the power of witnesses to produce, and without which grave interests might be jeopardized, and the administration of justice thwarted.³ If the examination before the master shows that the books wanted are not in possession of the party, but in the possession of a third person, the court will grant a subpoena *duces tecum*, commanding him to bring them, and will aid in ferreting out and punishing the evasion of its order.⁴ It is the duty of a party or witness, if he has ever had the book, document or paper in his possession, to make diligent and faithful search for the same in every place where it is likely to be found.⁵ Where a party to a suit is thus commanded by subpoena *duces tecum* to produce books, documents and papers as

¹ *Bischoffsheim v. Brown*, 29 Fed. Trust Co., 21 Blatchf. 246, 15 Fed. 341, 343; *Merchants' Nat. Bank v. State Nat. Bank*, 8 Cliff. 201, Fed. Cas. 9,448. 716. As to the production of telegrams by telegraph companies, see *Henisler v. Freedman*, 2 Pars. Select

² *King v. Dixon*, 8 Burr. 1687; *Central Nat. Bank v. Arthur*, 2 Cas. 274; *United States v. Babcock*, 8 Dill. 566, Fed. Cas. 14,484.

Sweeney (N. Y.), 194; *Bonesteel v. Lynde*, 8 How. Pr. (N. Y.) 226, 233; ⁴ *Russell v. McLellan*, 8 Woodb. & M. 157, 168, Fed. Cas. 12,158.

Miles v. Dawson, 1 Esp. N. P. Cas. 405. ⁵ *Bischoffsheim v. Brown*, 29 Fed.

³ *Wertheim v. Continental Ry. & 341, 343.*

evidence, he cannot excuse himself by showing that he has delivered them to his counsel.¹ Although a party upon whom a subpoena *duces tecum* is served may not have the actual possession of the document required, yet, if it is in his power to produce it, he must do so.² Lord Ellenborough says: "Although a paper should be in the legal custody of one man, yet if a subpoena *duces tecum* is served on another, who has the means to produce it, he is bound to do so."³

When papers are thus produced in obedience to a writ of subpoena *duces tecum*, before he can be required to exhibit their contents, he is entitled to appeal to the discretion of the court as to whether there exists any sufficient reason to protect him from a disclosure.⁴ As said by Judge Lacombe: "No doubt, when it is brought into court, the objection that 'it is against conscience and the spirit of Anglo-Saxon laws and liberty' to permit its inspection by the other side, or its introduction in evidence, may be urged, as it has been in this case, before the document has been submitted to any one but the court. But that the process of subpoena *duces tecum* is a convenient, efficient and proper method for bringing the paper into court is beyond dispute in this circuit."⁵ But the party having by this writ secured the production of the documents cannot be compelled to swear and examine the witness.⁶ If a party or witness fails to produce books upon the hearing of a cause when ordered to do so, he is not only liable for contempt of court, but is also liable to the party injured by such failure for all damages he may have sustained.⁷ The objection to this method is that when a party produces documentary evidence in obedience to a subpoena *duces tecum*, inspection of the same cannot be as readily had as when they are produced under an order of the court, for, in the latter case, the time, place and

¹ Edison Electric Light Co. v. U. S. Electric Light Co., 44 Fed. 294, 297.

⁴ Bischoffsheim v. Brown, 29 Fed. 341, 343.

² Amey v. Long, 1 Camp. 14, 17; Wertheim v. Continental Ry. Co., 21 Blatchf. 246, 15 Fed. 716.

⁵ Edison Electric Light Co. v. U. S. Electric L. Co., 45 Fed. 55, 57.

⁶ See 15 Fed. 726, and cases cited.

³ Amey v. Long, 1 Camp. 14, 17; Wertheim v. Continental Ry. & Trust Co., 21 Blatchf. 246, 15 Fed. 716, 718.

⁷ Amey v. Long, 1 Camp. 14; 9 East, 473; Lane v. Cole, 12 Barb. (N. Y.) 680; and see note to 15 Fed. 729.

manner of such inspection are under the direction of the master.

§ 207. Subpœna duces tecum — Continued.— While there is no question as to the power of the court to compel the production of books, papers and documents, in the master's office by a subpœna *duces tecum*, yet, in most cases, the interest of justice will be best subserved by compelling their production under an order of the court. This is true for two reasons:

First. If documents are brought in by a subpœna, the party is deprived of their inspection until after the witness bringing them in identifies them upon the stand. A party who has been compelled to produce a book, paper, or document, before the master by a subpœna *duces tecum*, cannot be compelled to part with the possession of the same until he goes upon the stand as a witness. For until it is duly proved by the witness producing it, he cannot be deprived of the custody or possession thereof.¹

Second. Sometimes it proves a dangerous experiment, because, where a party calls for the production of a book, paper or document by a subpœna *duces tecum*, and, upon its production, after inspecting it, declines to put it in evidence, the party producing it has the right to put it in evidence.²

A subpœna *duces tecum* commanding a party to appear at a certain place and time named in the writ, and bring with him a certain book, omitting the direction to testify, is invalid, and the party refusing to obey it cannot be attached for contempt;³ so, too, this writ can only be resorted to, to compel the production of books, papers and documents. A party cannot be compelled to produce patterns for stove-castings, or other physical objects, by this writ.⁴ There is no question but that the proper practice is for the subpœna to be issued from the clerk's office, duly signed by him, and authenticated with the seal of the

¹ Aikin v. Martin, 11 Paige, 499, 501.

² Edison Electric Light Co. v. U. S. Electric L. Co., 45 Fed. 55, 59; Jordan v. Wilkins, 2 Wash. C. C. 482, Fed. Cas. 7,526; Wallar v. Stewart, 4 Cranch, C. C. 532, Fed. Cas. 17,109.

For a valuable note on the production of documents see 15 Fed. 718 *et seq.*

³ Murray v. Elston, 23 N. J. Eq. 212.

⁴ Johnson Steel Street-Rail Co. v. North Branch Steel Co., 48 Fed. 191.

court. This is provided for by United States Equity Rule 78, and has been repeatedly recognized as the proper method.¹ Such a subpoena is issued in blank, and filled up by the master. This applies to a subpoena *duces tecum*, as well as an ordinary subpoena.² But, as we have already seen, it is the constant practice of masters, both in the state and federal courts, to issue subpoenas commanding the appearance of both parties and witnesses, including subpoenas *duces tecum*, to compel the production of books, papers and documents, though the power to do so may be questioned. It is all right if the subpoena is obeyed, but, if a party should refuse to produce the document called for, it is doubtful whether he could be punished for contempt of court. The safer plan is to have the subpoena issued by the clerk of the court.³

§ 208. Subpoena *duces tecum*—Continued.—When the writ is issued by the master it may be in the following form:

Subpoena Duces Tecum.

STATE OF ILLINOIS, }
County of Cook. } ss.

*The People of the State of Illinois to William J. Andrews,
Greeting:*

We command you, that all business and excuses being laid aside, you and each of you attend before me, the honorable John L. Baker, one of the masters in chancery of the superior court of Cook county, on the 12th day of June, A. D. 1902, at 10 o'clock in the forenoon, at my office, room 604, No. 126 Clark street, in Chicago, in said county, to testify and give evidence in a certain cause now pending and undetermined in said court, wherein Alexander H. Berry is complainant, and Charles R. Brown *et al.* are defendants, on the part of the said complainant; and that you also diligently and carefully search for, examine and inquire after and bring with you and produce at the time and place aforesaid, a certain cash book marked on the back "A," also one certain ledger, marked on the back "B," also one certain blotter, marked on the back "C," all of said books being the account books of the firm of Berry & Brown, and kept during the year 1901; and also one contract of date December 26, 1899, signed by Alexander

¹ Johnson Steel Street-Rail Co. v. North Branch Steel Co., 48 Fed. 191.

² Id.

³ See *ante*, §§ 196, 197.

H. Berry, and also by Charles C. Brown, and by them left with you for safe keeping; together with all copies, drafts and vouchers relating to the said documents, and all other documents, letters and paper writings whatsoever that can or may afford any information or evidence in said cause; and this you shall in no wise omit, under the penalty of the law, and have you then and there this writ.

Given under my hand, this 24th day of May, A. D. 1902.

JOHN L. BAKER,
Master in Chancery of the Superior
Court of Cook County, Illinois.

It is not necessary that this writ should be served by a sheriff, but, if served by a private individual, the following affidavit should be made and attached hereto:

STATE OF ILLINOIS, }
Cook County, } ss.

Henry T. Waller, being duly sworn, on oath says that he served the within writ by reading the same to the within named William J. Andrews, and also by delivering to him a true copy thereof on the 26th day of May, 1902, in said court.

HENRY T. WALLER.

Sworn to before me this 26th day of May 1902.

JOHN L. BAKER,
Master in Chancery.

The books, papers, or documents called for are only to be described with that degree of certainty which is practicable, considering all the circumstances of the case, so that the witness may be able to know what is wanted of him, and to have the matters called for on the hearing to be used in evidence, if competent.¹ The clause commanding the witness to diligently and carefully search for the matter called for is unnecessary, as it is his duty so to do under the law, but it is well to insert a clause to that effect, as a means of calling his attention to this duty.²

§ 209. Failure to produce books or documents.— Where a party is ordered to produce books, deeds and other writings before the master, or to appear before the master and submit to an examination, and makes default as to either of these acts, the proper course is to move the court to proceed against him for contempt. Knowledge of the failure to comply with the

¹ United States v. Babcock, 8 Dill. C. C. 566, 570, Fed. Cas. 14,484.

² Id. 566, 571.

order is brought to the court by "the master's certificate of the party's default," or other proper "proof of such default."¹ If the master should refuse his certificate of the default, on the ground that the party is not compellable, upon his construction of the decree, to make any such production, or to submit to such examination, then the proper course is to make application direct to the court for an order on the party himself, that he comply with the order, and that if he fail to comply within a given time that he stand committed for contempt.² That is, a party or witness may be guilty of contempt of court by refusal to produce books, papers, etc., when ordered to do so either by subpoena *duces tecum* or a special order of court.³ Default in production of books or documents before the master in obedience to an order of court is as much a contempt of court, as a refusal to produce them in obedience to a subpoena.⁴ So, too, when books and papers are brought into the master's office in compliance with an order of court, or by a third person as evidence in favor of either of the parties to the reference, it is a contempt of court to take such papers out of the custody of the master without his consent and contrary to his directions.⁵

In an English case, in the discussion of a motion to commit a party for contempt for failure to produce books and documents in obedience to an order of court, the master of the rolls said: "That when a decree is pronounced for the master to take an account in the usual form, and with the usual directions for production of documents; if in the prosecution of the reference, it becomes necessary for one party to inspect documents in the hands of the other, and he refuses to produce them, the court will make an order for their production, on a certificate by the master, that their inspection is necessary. They can be detained in the master's office no longer than is necessary for the purposes of examination; but the preliminary step is, to obtain the master's certificate, upon which alone the

¹ 2 Browne's Ch. Pr. 735, 736.

² Id. 914, 915.

³ Campbell v. Dalhousie, L. R. 1 Sc. App. 462; Bonesteel v. Lynde, 8 How. Pr. 226, 233.

⁴ Keefe v. Ward, 18 Can. L. J. 166;

Sutherland v. Rogers, 2 Chy. Ch. R. (Ont.) 191.

⁵ Wells v. Glen (N. Y. Ch. Cas.), decided Jan. 16 1839. See N. Y. Ch. Rules (Walworth's ed. 1844), p. 82, note; 2 Barb. Ch. Pr. 480.

court will act."¹ Where a party or a witness refuses to produce books or papers before the master and the master certifies the matter to the court, the proper method of bringing on the question as to the propriety of the master is by excepting to his certificate.² If there is any justifiable reason for a party's failure he should set it up before the master, and if the master decides against him he may again set it up in the contempt proceeding. He may have a lawful excuse for not producing books, papers, etc., either when ordered to do so by subpoena *duces tecum*, or by a special order of court.³

§ 210. Failure to produce books or documents — Continued.— In case of a failure to produce books and documents in obedience to an order of court, or a writ of subpoena *duces tecum*, the certificate of the master may be in the following form:

Certificate of Default in Not Producing.

In the Circuit Court of the United States for the Northern
District of Illinois, Northern Division.

George M. Baker, Plaintiff,	}	In Chancery.
v.		
Alexander A. Hart <i>et al.</i> , Defendants.		

At the request of James K. Hardin, solicitor for the plaintiff in the above cause, I do hereby certify that the defendant, Alexander A. Hart, was duly summoned to produce before me all books, deeds, papers and writings in his custody or power, relating to the accounts directed to be taken in this cause by a day now past, of the service of which summons upon the solicitor of the said defendant due proof has been made to me. But the said defendant has not produced before me such books, papers or writings, or any of them,— which I submit and certify.

Dated this the 18th day of June, A. D. 1902.

IRA S. HOWARD,
Master in Chancery of the Circuit Court of
the United States for the Northern Dis-
trict of Illinois, Northern Division.

, in a case where the defendant has applied to the master

oke v. Hughes, 1 Hogan's Rep.
See Jones v. Powell, 1 Sim. 387;
Hoffman, Ch. Pr. 527 and note.
Smith's Ch. Pr. 357; Chennell v.
n, 4 Sim. 340.

³ Bull v. Loveland, 10 Pick. (Mass.)
9, 14; Chaplain v. Briscoe, 5 Sm. & M.
(Mass.) 193, 206; Lane v. Cole, 13 Barb.
(N. Y.) 660; Sudlow v. Knox, 7 Abb.
Pr. (N. S.) 411.

for further time and then failed to produce, his certificate may read as follows:

At the request of James K. Hardin, the solicitor for the plaintiff in the above cause, I do certify that the defendant, Alexander A. Hart, being duly summoned to produce before me all books, deeds, papers and writings in his custody or power, relating to the accounts directed to be taken by the decree in this cause by a day now past; applied for and obtained time therefor, which time expired the 18th day of June, A. D. 1902, of the service of which summons upon the solicitor of the said defendant due proof has been made to me. But the said defendant has not produced, etc. [*as above*].¹

X. DEFAULTED DEFENDANTS — RIGHTS OF.

§ 211. Rights of defaulted defendants in the master's office.— As to the right of the defaulted defendant to appear in the master's office upon a reference, and of the necessity of notice to defaulted defendants of proceedings in the master's office, something has been already said.² It only remains now, therefore, for us to see what the rights of a defaulted defendant are upon his appearance in the master's office. Of the rights of a defendant upon a reference to a master after a decree *pro confesso*, Mr. Justice Bradley, speaking for the supreme court, says: "In the English practice, it is true, as it existed at the time of the adoption of our present rules,³ the defendant, after a decree *pro confesso* and a reference for an account, was entitled to appear before the master and to have notice of, and take part in, the proceedings, provided he obtained an order of the court for that purpose, which would be granted on terms. 2 Daniell, Ch. Pr., 804, 1st ed.; Id. 1358, 2d ed. by Perkins; Heyn v. Heyn, Jacob, 49. The former practice in the court of chancery of New York was substantially the same. 1 Hoffman, Ch. Pr. 520; 1 Barb. Ch. Pr. 479. In New Jersey, except in plain cases of decree for foreclosure of a mortgage (where no reference is required), the matter is left to the discretion of the court. Sometimes notice is ordered to be given to the defendant to attend before the master, and sometimes not; as it is also in the chancellor's discretion to

¹ Adapted from Hoffman's Masters in Chancery, 882.

² See *ante*, §§ 184-187.

³ United States Equity Rules 1842.

order a bill to be taken *pro confesso* for a default, or to order the complainant to take proofs to sustain the allegations of the bill. Nixon's Dig., Art. Chancery, § 21; Gen. Orders in Chancery, XIV, 3-7; Brundage v. Goodfellow, 4 Halst. Ch. (8 N. J. Eq.) 513."¹

In case of a decree *pro confesso* for want of an appearance, a defendant cannot be heard to complain that the evidence does not sustain the allegations of the bill. It is discretionary with the court, under the chancery practice of Illinois, whether it will require any evidence to be produced.² Hence, in such a case, upon reference to a master to take proof, no notice is required to be given to the defendants of the reference to, or hearing before, the master. The proceedings, after default for want of appearance, are *ex parte*, hence there is no one before the court whom the plaintiff can serve.³ In this regard there is a difference between decrees *pro confesso* for want of appearance and a decree for want of an answer after an appearance.⁴ In the former case all that is necessary is that the findings shall be within the allegations of the bill.⁵

§ 212. Rights of defaulted defendants in the master's office — Continued.— Upon a bill taken as confessed and an order of reference thereupon to the master, such allegations of the bill as are distinct and positive are taken as true without proof; but where the allegations are indefinite, or the demand of the complainant is in its nature uncertain, the certainty requisite to a proper decree must be supported by proofs. The bill, when confessed by the default of the defendant, is taken to be true in all matters alleged with sufficient certainty, but in respect to matters not alleged with due certainty, or subjects which from their nature require an examination of details, the obligation to furnish proofs rests on the complainant.⁶ The question arises upon a default and reference

¹ Thomson v. Wooster, 114 U. S. 104, 119, 5 Sup. Ct. 788.

² Ferguson v. Sutphen, 3 Gilm. (Ill.) 547; Manchester v. McKee, 4 Gilm. (Ill.) 511; Smith v. Trimble et al., 27 Ill. 152; Harmon v. Campbell, 30 Ill. 25; Sullivan v. Sullivan, 42 Ill. 815, 318; Cronan v. Frizell, Adm'r, 42 Ill. 319, 321; Van Valkenburg v. Trustees of Schools, 66 Ill. 103

³ Armstrong v. Douglas Park Building Ass'n, 60 Ill. App. 318, 320.

⁴ Id. See also Daniell, Ch. Pl. & Pr. (6th Am. ed.), p. 1175, and Van Valkenburg v. Trustees of Schools, 66 Ill. 104.

⁵ Id.

⁶ Williams v. Corwin, Hopkins Ch. 534, 540, 541.

whether any testimony at all is necessary to support the allegations of the bill. The facts stated in the bill being admitted, the sole question is whether or not its allegations are such as to warrant a decree without any testimony in aid thereof. The rule on this subject is stated thus: "If the allegations are sufficiently clear and positive to establish a fact without other proof, it need not be adduced; but if they are vague and indefinite, further proof should be given."¹ When allegations are distinct and positive and the bill is taken for confessed, such allegations are taken as true without proof, but when such allegations are indefinite, or the demand of the plaintiff is in its nature uncertain, the certainty necessary to a proper decree must be afforded by proofs.²

Where the default of the defendant is entered, the bill taken as confessed and the cause referred to the master, the defendant will not be permitted to controvert the truth of any allegation of the bill before the master. By his default he admits every fact stated in the bill. If he desires to controvert the allegations of the bill he must do so by plea or answer, and not having done so he is precluded from introducing evidence for that purpose before the master.³ A party who is in default may appear before the master and cross-examine any witnesses introduced by the plaintiff, but he may not introduce testimony in his own behalf. He has a right to stand by and see that the plaintiff makes out his case. While in default he may resist passively whatever is brought to attack him, but cannot make a counter attack. Though not allowed to return the fire, he is not obliged to run, but must stand until he is shot down.⁴

§ 213. Rights of defaulted defendants in the master's office — Continued.— A party, who has been defaulted for want of an answer and a decree entered against him *pro confesso*, has no right to appear before the master and there set up a claim which he failed to assert by answer simply because the

¹ Ward v. Jewett, Walk. Ch. (Mich.) 45.

² Welsh v. Solenberger, 85 Va. 441, 443, 8 S. E. 91; Thomson v. Wooster, 114 U. S. 104, 111, 5 Sup. Ct. R. 788.

³ Ward v. Jewett, Walk. Ch. (Mich.) 45.

⁴ Durden v. Carhart, 41 Ga. 76, 81; Hayden v. Johnson, 59 Ga. 104, 106; Davis v. Wimberly, 86 Ga. 46, 48, 12 S. E. 208.

court directed the master, by the order of reference, to notify all the parties to the suit whether they had appeared or not. Such a party has no standing in the cause.¹ In New Jersey, by Chancery Rule No. 22, no notice is required to be given in a reference to a defaulted defendant, and upon the coming in of a master's report it is not necessary to confirm the same, but the complainant is entitled to a decree. In that state it is also provided that in case a party is notified to appear before a master, upon a reference, and refuses or neglects to attend, orders *nisi* to confirm reports need not be served on such defendant, but shall become absolute of course, unless cause be shown to the contrary.²

From what has been said above, we may safely deduce the following rules:

First. A defendant defaulted either for want of appearance, or after appearance for want of an answer, has the right to appear in the master's office upon a reference.

Second. But, in neither case has the defendant the right to controvert any of the allegations of the complainant's bill, for these are all admitted by his default.

Third. He has no right, in the master's office, to set up or attempt to prove any fact, by way of defense, for, if any such fact exists, he should have set it up by way of answer.

Fourth. He may cross-examine witnesses introduced by his opponent, but he cannot introduce witnesses. He may defend, but he cannot attack; he may hold up his shield, but he cannot wield a lance.

Fifth. In some courts a defaulted defendant has no right in the master's office, upon a reference, except under a special order of court.

Sixth. In some jurisdictions a defaulted defendant is barred out of the master's office, upon a reference, by a rule of court, or by statute.

XI. THE EVIDENCE.

§ 214. Taking the evidence — General principles.— It is the duty of the master to be personally present and to supervise every step taken in the hearing of a matter referred to

¹ Kuhl v. Martin, 28 N. J. Eq. 370.

² N. J. Ch. Rule, No. 25.

him. The same reasons requiring the judge to be in the courtroom and to devote his personal attention to a matter on hearing before him apply with equal force to a master upon a hearing in his office. The too common practice of swearing the witnesses and sending them with parties, counsel and a stenographer to an adjoining room to take the testimony, will not be tolerated by the court. The master in forming his conclusions of fact is required to take into consideration the appearance and manner of the witnesses while on the stand, and in passing on objections to his report, the chancellor, unless the contrary is shown, will assume, and has a right to assume, that the master discharged his duty in this regard; hence, counsel for the protection of the rights of their clients, and in justice to the court, should insist on the personal presence of the master at each step in the hearing, and especially if testimony is taken before a stenographer, out of the presence and hearing of the master, that his minutes shall show such fact.¹ The rule is, that upon the hearing before a master in chancery, "the parties have the same right to be heard, by themselves or by counsel, to introduce evidence, to cross-examine witnesses, and to take the various steps authorized by law, as if the hearing was before the chancellor instead of the master."² A direction to inquire into a fact is in the nature of a new issue joined, and what would be evidence in any other case will be evidence before the master.³ In an examination in a master's office, witness and counsel are to be governed by the same rules which would control them in a court of law. Counsel are not to hold a whispering conversation with a witness, nor retire with him for private consultation; nor after consultation dictate his answers. His advice must be given under the eye and in the hearing of the master. The witness is to give his answers in his own language.⁴

In some cases this matter is regulated by statute or by rule

¹ *Schnadt v. Davis*, 185 Ill. 476, 486, 57 N. E. 652. See also *post*, §§ 351-357.

² *Union Mutual Life Ins. Co. v. Slee*, 123 Ill. 57, 94, 12 N. E. 543; *Whiteside v. Pulliam*, 25 Ill. 285; *McClay, Adm'r. v. Norris*, 4 Gilm. (Ill.) 370.

³ *Smith v. Althus*, 11 Ves. 564; *Gresley's Eq. Ev.*, p. 503; *Atwood v. Shenandoah Val. R. Co.*, 85 Va. 966; s. c., 9 S. E. 748; *Beach, Eq. Pr.*, sec. 689; *Daniell, Ch. Pr.* 1188.

⁴ *Stewart v. Turner*, 8 Edw. Ch. 458.

of court. For example, in New Jersey the statute provides that upon a reference the master shall take and hear the evidence of the witnesses orally, in the same manner as evidence is taken and heard in courts of law on trials before a jury.¹ In Pennsylvania it is provided by supreme court equity rule that when a case in equity is referred to a referee he shall, on the day fixed by him for trial, unless the cause be continued, proceed to hear the parties, and sit from day to day, continuously, for that purpose; and that he shall hear the testimony, seal bills of exceptions to the admission and rejection of evidence, make findings of fact and of law, act upon the points or requests that may be presented by counsel, and prepare the form for a final decree. In short, the rule referred to provides for a trial before such referee precisely as a trial is conducted in court, except that it results in a report and recommendation of a decree instead of the entry of such decree.² Under this rule the trial before a referee in an equity case in that state is conducted precisely as upon a trial in court, and the same is true of a hearing before a master commissioner in the states of Indiana and New Jersey.³ So, too, in California a hearing before a master must be carried on precisely as on a trial in court. As the evidence is offered, parties are required to make the same objections in the same manner and at the same time as on a trial in court.⁴

§ 215. Taking the evidence — General principles — Continued.— It follows, therefore, as above stated, that the rules governing the admissibility or rejection of evidence before a master or a referee are precisely the same as in a trial before the court. For example, handwriting is proved in the same way before the master as upon a trial in court. The same rules apply in the one case as in the other.⁵ So, also, hearsay evidence is no more admissible upon a hearing before the master than upon a trial in court.⁶ Where

¹ Rev. Stat. 1895, p. 397, § 129.

² 1 Brewster, Eq. Pr., § 5177.

³ *Gilmore v. Board of Commissioners*, 85 Ind. 344, 347; *Lee v. State*, 88 Ind. 256, 259; *McCutchen v. McCutchen*, 141 Ind. 697, 699, 41 N. E. 324, and cases cited. N. J. Ch. Rule, No. 196.

⁴ *Phelps v. Peabody*, 7 Cal. 50, 52; *Goodrich v. Myers*, 5 Cal. 430; *Tyson v. Wells*, 2 Cal. 122, 131.

⁵ *Gibson v. Trowbridge Furniture Co.*, 96 Ala. 357, 361, 11 So. 365.

⁶ *De la Riva v. Berreyesa*, 2 Cal. 195.

a cause is referred to the master "*to hear and report the evidence*," either party may introduce before him such evidence as he may choose, or he may take depositions, or introduce oral evidence on the hearing, unless in cases of reference to state an account, when all the evidence should be brought before the master; but on the hearing before him it may be by deposition, documentary or oral evidence, or either, or all of these modes may be resorted to in stating the account.¹

Rule 69 of the English Chancery Orders of 1828 gave the master power, at his discretion, to examine any witness *viva voce*. It therefore became necessary to make some provision as to the duty of the master relative to the preservation of such evidence; therefore the same rule further provided "that the evidence upon such *viva voce* examination shall be taken down by the master, or by the master's clerk in his presence, and preserved in the master's office, in order that the same may be used by the court if necessary."² This same provision is incorporated in N. Y. Ch. Rule, No. 105; U. S. Equity Rule, No. 81; N. J. Ch. Rules, No. 44, 196, and Rule No. 4 of "Rules Governing Masters in Chancery" of the circuit and superior courts at Chicago. Before the adoption of this English Chancery Order of 1828, as evidence before a master was necessarily taken upon written interrogatories, no such direction was necessary. So too, in Alabama, by Chancery Rule 89, it is provided that: "Testimony offered before the register must be noted by him, and nothing not so noted shall be considered. Oral testimony taken before him shall be reduced to writing, paged severally, and the name of the witness and the subject of the testimony noted in the margin. Such testimony shall be properly attached, and is part of the file." The evidence of each witness, after it is taken and written up, should be carefully read over to the witness and then signed by him; but this objection, if intended to be relied upon, must be raised in apt time, otherwise the maxim *Consensus tollit errorem* applies.

§ 216. Taking the evidence — General principles — Continued.— In a recent case in Illinois the supreme court of that state say: "The objection that the witnesses testifying before

¹ *Grob v. Cushman*, 45 Ill. 119, 125.

² *Gresley*, Eq. Ev. 507; 1 *Smith*, Ch. Pr. 568.

the master did not sign, nor were their signatures waived, is not true, as a matter of fact, as shown by the master's report. His certificate is that their testimony was reduced to writing, and by such witnesses "read at the time and sworn to before me, except where the signature to the deposition was waived by stipulation of counsel." But if it were otherwise, the question that the evidence was not signed or waived cannot be raised for the first time in the upper court.¹

In the taking of testimony by a master, if the cheapest plan is as good as any other, under all the circumstances, that plan should be adopted. It should not be inferred, however, that the master should be governed in every case by the estimated cost of two or more ways of taking testimony abroad, and adopt the cheapest. The taking of testimony before an examiner orally, in the presence of the parties, is much more satisfactory than taking it by commission, and the rule (67 U. S. Equity) should be construed so as to allow this to be done whenever a party desires it.²

§ 217. Time when evidence must be taken.—There are certain rules governing the time of the introduction of evidence which should be carefully observed by both the master and by counsel. These rules are as follows:

First. No testimony can be taken by a master until the order of reference is actually entered; and if by inadvertence any evidence is taken before such order is entered, a subsequent entry of an order *nunc pro tunc* does not cure the defect.³

Second. No testimony should be taken until the case is at issue as to all the defendants.⁴

If a case has been prematurely referred, before all the de-

¹ Jones v. King, 86 Ill. 225; Dorn v. Ross, 177 Ill. 225, 228, 52 N. E. 821.

² Bate Refrigerating Co. v. Gillette, 28 Fed. 673, 676. For general principles of taking testimony before the master, see Remsen v. Remsen, 2 Johns. Ch. 495, 496; Gass v. Stinson, 2 Sumn. 605, Fed. Cas. 5,261; Jenkins v. Eldredge, 3 Story, 299, Fed. Cas. 7,267; Hollister v. Barkley, 11 N. H. 501; Benson v. Le Roy, 1 Paige, 122;

McDougald v. Dougherty, 11 Ga. 370; Dougherty v. Jones, 11 Ga. 432; Gilmore v. Gilmore, 40 Me. 50.

³ Hawley v. Simons, 157 Ill. 218-224, 41 N. E. 616. See *ante*, ch. IV, div. 1, "Order of Reference," §§ 150, 151.

⁴ Hall Lumber Co. v. Gustin, 54 Mich. 624, 37 N. W. 569; Kelly v. Gartner, 90 Mich. 264, 265, 51 N. W. 278.

fendants have answered or been defaulted, the master should call the attention of counsel to such fact, that the order of reference may be set aside and the issues completed. All testimony taken before a defendant has answered, or been defaulted, is not binding upon him.¹

Third. Sometimes the order of reference limits the time for taking testimony before the master. In such case parties must be careful to comply with the terms of the order, and, if unable to do so, to have the order extended by the court before the time expires.

Fourth. A rule of court may limit the time for taking evidence. In such case the rule has the same effect as a like provision would have if inserted in the order of reference, and must be complied with or the time extended by the court, the master having no power to extend the time or to ignore the rule.²

A Michigan rule of court limits the time for taking all proofs before commissioners as follows: A complainant has thirty days to take his evidence in chief; the defendant forty days to take his evidence, and the complainant ten days to take his evidence in rebuttal.³ If the complainant takes no proof within the forty days, the case stands for hearing on the pleadings.⁴

Fifth. In all cases the master has the power to fix a time for closing proofs, and in such case the rule must be complied with for the time extended before the rule expires.

§ 218. Time when evidence must be taken — Continued. Under the authority vested in the master to "regulate all the proceedings in every hearing before him," he has power, at any time within his discretion, to fix upon a day when a party should close his proofs. This is independent of any special rule of court upon the subject.⁵ Sometimes the court, by special rule, provides for such action upon the part of the master.

¹ Hall Lumber Co. v. Gustin, 54 Mich. 624, 630, 37 N. W. 569; Vermilyea v. Odell, 4 Paige, 121; Hastings v. Palmer, Clarke's Ch. (N. Y.) 52; Kelly v. Gartner, 90 Mich. 264, 51 N. W. 278. See ante, ch. III, div.

3, "At What Time a Reference Will be Made," § 130.

² As to the binding effect of rules of court, see §§ 167-171.

³ Rule 8e, Stevens' Rules, p. 128.

⁴ Id., p. 129.

⁵ Sweeney v. Kaufmann, 168 Ill. 238.

For example, a chancery rule of both the circuit and superior courts in Chicago provides that the master "may, in his discretion, fix a day within which the complainant shall close his proofs, which time he may, in his discretion, for good cause shown, extend for such reasonable time as justice may require; and, as soon as the complainant has closed his proofs, shall fix a time within which the defendant shall close his proofs, and the complainant his proofs in rebuttal; and, in his discretion, for good cause, may extend the time for such reasonable time as justice may require; and in case the parties shall not close their proofs within the time limited by the master, he shall proceed to make up his report upon the testimony and evidence that may have been submitted to him without waiting for further evidence or testimony from the party so failing to close his proofs within the time limited."¹

Where parties upon whom a rule is entered to close proofs are not present at the time of the entry of the same, the master should see that they are duly notified. Such notice may be in the following form:

Form of Notice of Rule to Close Proofs.

STATE OF ILLINOIS,	{	ss.	In the Superior Court of Cook County.
County of Cook,			
George W. Stanley	{		Gen. No. 176,948.
v.			
Charles T. Fry and			
Mary S. Fry.			Term No. 4,638.
			In Chancery.

To William M. Taylor, Solicitor for defendants in above cause:

DEAR SIR:—You are hereby notified that I have this day entered a rule upon the defendants to close their proofs by 4 o'clock in the afternoon of the 22d day of September, A. D. 1902.

Respectfully yours, etc.,

WM. FENIMORE COOPER,
Master in Chancery of the Circuit
Court of Cook County.

Dated this Sept. 9th, A. D. 1902.

Received copy of above notice this Sept. 9th, A. D. 1902.

WILLIAM M. TAYLOR,
Solicitor for defendants.

¹ Rule 1 of rules "Governing Masters in Chancery" of the circuit and superior courts.

If the rule is a general one, requiring all parties to close proofs by a given time, the above notice should be changed accordingly and served on the solicitors of all parties. The master should be careful to see that a memorandum is made in his minutes showing the entry of such rule.

The fact that the court is not in session does not limit the master's authority in this regard, but he still may make an order requiring proof to be closed within a given time.¹ A party must use diligence to comply with such an order. Where a party is ruled to close his proof by a given day, and voluntarily absents himself, and neglects to produce any evidence, he cannot be heard to complain on the hearing before the chancellor that the report contains only the evidence of his adversary.² It is irregular, and improper to take depositions after the entry of an order closing proof, and no motion is necessary to suppress depositions so taken, in order to exclude them from consideration on the hearing.³

§ 219. Oral examination of witnesses.— Upon a reference to a master where witnesses are to be examined the hearing now assumes the form of a trial in court, and the witnesses are examined orally. Yet this has not always been the practice. In ancient times the examinations in chancery were in open court before the master of the rolls — in the exchequer before one of the barons; and therefore it should seem, says Gilbert, C. B., that the examination might be upon the bill without interrogatories drawn and framed, as the examination of the canonists may be upon the *libellus articulatus*; but afterwards the master of the rolls having left the examination of the witnesses to his clerks, as the barons of the exchequer did theirs, from thence forward the counsel of the party whose witnesses were to be examined framed the interrogatories upon which the clerks examined. These clerks became regular officers of the courts, through whom in London, as through commissioners elsewhere, written answers were procured to the written interrogatories.⁴ Papers and documents, intended as exhibits,

¹ *Sweeney v. Kaufmann*, 168 Ill. 233,
48 N. E. 144, 64 Ill. App. 151.

² *Abbott v. Alsdorf*, 19 Mich. 157,
161.

³ *Gilliam v. Baldwin*, 96 Ill. App.

⁴ *Gresley's Eq. Ev.* 52, 53.

might, however, be identified by witnesses *viva voce* at the hearing.

Attempts were sometimes made to examine witnesses *viva voce* at the hearing, but this was peremptorily refused by Lord Hardwicke, yet the power of the court so to proceed was undoubted and was exercised, when occasion required, for the "satisfaction of the court itself as to particular points." One of the learned solicitors of the court, experienced in this practical method (?) of obtaining testimony, said: "A regular set of interrogatories is prepared beforehand, dressed up in such language that I have often found it exceedingly difficult to render them intelligible to the witness; those interrogatories are prepared not to meet the evidence supposed to come from one witness, but a variety of witnesses all parties to the same point."¹ This method resulted too frequently in the examination of a "multitude of witnesses upon a multitude of questions altogether unknown to them."

The danger of failing to elicit from the witness such information as he might have upon the subject, by not fully interrogating him, required great skill in the drafting of interrogatories. Gresley, after enumerating the difficulties of preparing interrogatories best suited to the occasion, says: "If this is borne in mind, and also that the examiner or commissioner is bound to be satisfied with an answer, however meagre, if it strictly meets the question, and that although the witnesses may be numerous, only one set of interrogatories is allowed, the prolixity of a technical interrogatory with its numerous variations, often verging on tautology, will be seen to be absolutely necessary."²

§ 220. Oral examination of witnesses -- Continued.— Another rock to be avoided by counsel was the danger of having the evidence suppressed by reason of leading questions. An order of court, April 29, 1687, was intended to remedy this "prolixity of technical interrogatories," as well as leading ones. It runs thus:

"Whereas by experience great inconveniences have happened in several causes, by the exhibiting interrogatories which are impertinently drawn into great length, whereby the suitors

¹ Id. 56, note.

² Id. 56, 57.

have been put to great and unnecessary charge, as also leading interrogatories, whereby witnesses, by turning the negative into the affirmative, are led to swear to the whole contents of an interrogatory, and oftentimes thereby drawn ignorantly to forswear themselves, which in all times have been suppressed and deemed great abuses: Now, for the prevention thereof for the future, it is this day ordered by the Right Honorable the Lord High Chancellor, &c. that from and after the first day of June next, no interrogatories shall be exhibited for the examination of any witnesses in any cause depending in this Court, whether in Court, in the examiner's office, or by commission in the country, before such interrogatories shall be either drawn or perused by counsel, (after due consideration had of the pleadings) and signed by them. But all counsel are to take care, that no interrogatories do slightly pass their hands, contrary to the true intent and meaning hereof, least they incur the displeasure of the Court therein; and that all depositions taken contrary hereto shall stand suppressed; and, to the end, all the clerks and solicitors of this Court that are concerned in causes may not be ignorant hereof, his Lordship doth further order, that this Order be set up and fixed in some public places in the offices of the six-clerks and examiners of this Court, that all due obedience may be given thereto."¹

§ 221. Oral examination of witnesses — Continued.— Another order, of 1661, was intended to regulate the conduct of examiners, directing them "to be diligent in the examination of witnesses, and not to entrust the same to mean and inferior clerks; and are to take care to hold the witness to the point interrogated and not to run into extravagances and matters not pertinent to the question, thereby wasting paper for their own profit, of which the court will expect a strict account." Idle repetitions and needless circumstances were alike forbidden.² Is it any wonder that Lord Erskine characterized this old method as "a frail and imperfect mode of examining into facts?"³

¹ Beames' Orders in Ch., pp. 272, 273.

² Gresley, Eq. Ev. 68, notes.

³ White v. Wilson, 13 Ves. 87.

Harrison says that an examination was on *interrogatories*, under the old English practice, and that they were not settled by the master (as the interrogatories for the examination of a defendant were), but were settled and signed by counsel. When prepared they were engrossed on parchment, with a 2s. 6d. stamp, and left with the master's clerk, who examined the witnesses and afterwards delivered copies of the examination to the solicitor.¹ It is a matter of surprise to us that this cumbersome method of obtaining the evidence continued as long as it did, for it was not until 1828 that we find the English court of chancery authorizing by rule of court the oral examination of witnesses in the master's office, and even then we find the authority to examine upon written interrogatories was still left with the master. This English Chancery Order is as follows:

"That the master shall have power at his discretion to examine any witness *viva voce*, and in such case the subpoena for the attendance of the witness shall, upon a note from the master, be issued from the Subpoena-office; and that the evidence upon such *viva voce* examination shall be taken down by the master, or by the master's clerk in his presence, and preserved in the master's office, in order that the same may be used by the court, if necessary."²

§ 222. Oral examination of witnesses — Continued.— Notwithstanding the above order authorizing examination of witnesses *viva voce*, we can well understand that the lawyers of that period, especially the older ones, familiar, by long practice, with the old system, were reluctant to part with it, and that the master was not often, at first, called upon to exercise his discretion by allowing witnesses to be examined orally in his office. Yet, such examinations became more frequent as time passed on, until it finally became the rule instead of the exception.

Before the adoption of this English Chancery Order we find the courts in this country seeking to escape the cumbersome and unsatisfactory practice of examining witnesses only on written interrogatories in references to masters, and that they very

¹ Harr. Ch. Prac., vol. 2, 102.

² 1 Smith, Ch. Pr. (ed. 1834) 563.

early recognized the right of the parties to proceed by written interrogatories, or by *viva voce* examination, as the parties should deem most expedient, or the master should direct in a given case, permitting parties and counsel to be present at the taking of such testimony.¹ With this innovation it became the invariable practice for the master to exercise the right of admitting or rejecting witnesses offered, and of sustaining objections to questions propounded, or overruling them, as the case seemed to require. From the method of taking testimony upon written interrogatories this right was unknown in the practice before masters in England. Hoffman says: "As by our method, however, the objection can be taken and argued at once, as upon a trial at *nisi prius*, it has become the uniform practice to contest all questions upon the admission of evidence before the master and for him to decide them."²

§ 223. Oral examination of witnesses — Continued.—The technical and cumbersome practice in the English court of chancery is well stated by Chancellor Kent in *Remsen v. Remsen*, 2 Johns. Ch. 495 (1817). The defendant contended before the master that the plaintiff should exhibit his charges in writing, and that the testimony should be taken by the master privately, upon interrogatories; and that the depositions so taken should not be disclosed until the whole evidence of both parties was taken. The master decided against this course as not being according to the established practice of the court. This question was submitted to the court on report of the master. Counsel cited the English cases for and against such proceeding. Whereupon the chancellor said:

"I am not surprised that there should be doubts as to practice in this case. So late as *Parkinson v. Ingram*, 3 Ves. 603, it was a serious question whether the master could take the examination of a witness in any case, and whether all examinations, as well after as before a decree, must not be taken by the examiner. But it was declared, in that case, to be the settled practice for the master to take the examinations on references before him; and it would seem that the witnesses were

¹ *Remsen v. Remsen*, 2 Johns. Ch. 495, 498. ² *Masters in Chancery*, 57, 58.

summoned, under the usual subpoena, to appear and answer; and that the label to it was the only part which explained where, and before whom, he was to go for examination; and if a commission was necessary to examine witnesses in the country, the master certified the fact, and the commission issued of course."

"The only inquiry now is, in what manner testimony ought to be taken before the master."

"The books assume the practice to be settled, that the parties and witnesses are to be examined before the master upon written interrogatories; and that in the case of the examination of a party, the interrogatories are settled by the master, and in the case of a witness, they are settled by the counsel."¹

"Sometimes the master is directed to settle the interrogatories in the case of a witness, as in *Browning v. Barton*,² and exceptions may be taken to the interrogatories as settled by him.³ But though the exhibition of interrogatories, duly settled, be the usual mode of examination appearing in the books, I do not apprehend that it is indispensable. The practice with us, as I have reason to believe, has been more relaxed, and oral examinations have frequently, if not generally, prevailed. This appears to me to be a question merely of convenience, and does not involve any principle of policy or of right; but whether examinations shall be secret, and to what extent they shall be carried, suggests much more important considerations."

"If examinations are protracted from day to day, for any length of time, by which parties are enabled to detect the weak parts of the adversary's case, or of their own, and to hunt up or fabricate testimony to meet the pressure or exigency of the inquiry. It is to guard against this abuse that examinations in chief are not permitted after publication, and that courts of law will not grant new trials merely to enable a party to accumulate testimony on any given point, or to oppose that which was taken on the opposite side. It is

¹The Attorney-General, arg., in *Purcell v. M'Namara*, 17 Vesey, 484, *Parkinson v. Ingram*, 8 Ves. 603; and cases cited upon the argument. *Stanyford v. Tudor*, 2 Dickens, 548; ²2 Dickens, 508. *Hughes v. Williams*, 6 Vesey, 459; ³6 Vesey, 759.

also upon the same grounds, that a witness who has been examined in chief before the hearing cannot be re-examined before the master, without an order, and then, not to any matter to which he had before been examined,¹ and that a witness once examined before the master cannot be re-examined without an order.² In trials at common law the cause is heard, and the verdict taken at one sitting and all opportunity for getting up supplementary proof is precluded.”

“On the other hand, there are many inconveniences (which were alluded to by counsel) to be apprehended, from requiring all depositions to be secret, on taking an account before the master. In long and complicated accounts, it seems almost impossible to reduce the requisite inquiries to writing, in the first instance, and to know what questions to put, except as they arise in the progress of the inquiry; and it is a little surprising that no clear and decided evidence can be found, in the books, of the practice of secret examinations, if such be, indeed, the settled practice in the English chancery.”

§ 224. **Oral examination of witnesses — Continued.**— The general principles governing hearings in the master's office, as laid down by Chancellor Kent, are so important that I transcribe them in full. He says:³ “The general rules which are to be deduced from the books, or which ought to prevail on the subject of examinations before the master, and which appear to me to be best calculated to unite convenience and dispatch with sound principle and safety, are:

1. “That the parties should make their proofs as full, before publication, as the nature of the case requires or admits of, to the end that the supplementary proofs, before the master, may be as limited as the rights and responsibilities of the parties will admit.”

2. “That orders of reference should specify the principles on which the accounts are to be taken, or the inquiry proceed, as far as the court shall have decided thereon; and that the examinations before the master should be limited to such matters, within the limits of the order, as the principles of the decree or order may render necessary.”

¹ Dickens, 508.

² Remsen v. Remsen, 2 Johns. Ch.

³ Ves. 270; 2 Maddock's Ch. 392. 495.

3. "That no witness in chief, examined before publication, nor the parties, ought to be examined before the master, without an order for that purpose, which order usually specifies the object and extent of the examination; and a similar order seems to be requisite when a witness, once examined, is sought to be again examined before the master, on the same matter. But it is understood to be the settled course of the court,¹ that upon the defendant accounting before the master, he is to be allowed, on his own oath, being credible and uncontradicted, sums not exceeding forty shillings each; but then he must mention to whom paid, for what, and when, and he must swear positively to the fact, and not as to belief only, and the whole of the items so established must not exceed 100%, and the defendant cannot, by way of charge, charge another person in this way. The forty shillings sterling was the sum established in the early history of the court, and perhaps twenty dollars would not now be deemed an unreasonable substitute."

4. "That the master ought, in the first instance, to ascertain from the parties, or their counsel, by suitable acknowledgments, what matters or items are agreed to or admitted; and then, as a general rule, and for the sake of precision, the disputed items claimed by either party ought to be reduced to writing by the parties, respectively, by way of charges and discharges, and the requisite proofs ought then to be taken on written interrogatories, prepared by the parties, and approved by the master, or by *viva voce* examination, as the parties shall deem most expedient, or the master shall think proper to direct, in the given case. That the testimony may be taken in the presence of the parties, or their counsel (except when by a special order of the court it is to be taken secretly); and it ought to be reduced to writing, in cases where the master shall deem it advisable, by him or under his direction, as well where a party as where a witness is examined."

5. "That in all cases where the master is directed by the order to report the proofs, the depositions of the witnesses

¹ 1 Vern. 283; Anon., *Whicherly v. Robinson v. Cumming*, 3 Atk. 409. *Whicherly*, 2 Ch. Cas. 249; 1 Vern. and 2 Fonb. 452, 461, 462. 470; *Morely v. Bonge*, *Mosely*, 252;

should be reduced to writing by the master, and subscribed by the witnesses, and the depositions returned with his report to the court."

6. "That when an examination is once begun before a master, he ought, on assigning a reasonable time to the parties, to proceed, with as little delay and intermission as the nature of the case will admit of, to the conclusion of the examination, and, when once concluded, it ought not to be opened for further proof without special and very satisfactory cause shown."

7. "That after the examination is concluded, in cases of reference to take accounts, or make inquiries, the parties, their solicitors, or counsel, after being provided by the master with a copy of his report (and for which the rule of the 1st of November last makes provision), ought to have a day assigned them to attend before the master, to the settling of his report, and to make objections, in writing, if any they have; and when the report is finally settled and signed, the parties ought to be confined, in their exceptions to be taken in court, to such objections as were overruled or disallowed by the master."

"These being the general principles on which examinations before the master are to be conducted, I shall direct that so much of the master's report, in this case, as contains a decision, that the testimony be taken privately, and exclusively upon interrogatories in writing, be overruled; and that the parties be at liberty to examine the witnesses orally, unless the master shall determine, for special reasons applicable to that examination, or any part of it, that the interrogatories ought to be reduced to writing."

§ 225. **Oral examination of witnesses — Continued.**— At an early period we also find Chancellor Broom, of New Jersey, in an elaborate opinion, giving a clear statement of the old English practice, and showing the gradual departure therefrom, and upholding in his own state the right of oral examination.¹ The same question came before the supreme court of Alabama at a very early day, where we find the supreme court of that state holding that, under a general order of

¹ *Jackson v. Jackson's Ex'rs*, 3 N. J. Eq. 96, 102-105.

reference of "the matters of account" between the parties, without giving any direction as to the mode of taking testimony, whether any should be taken, or whether the same should be specially reported, it is competent for either of the parties to lay before the register the books of account, and also to examine witnesses *viva voce*, in aid or explanatory thereof. The court, quoting from Chancellor Kent in *Remsen v. Remsen*, 2 Johns. Ch. 495, recognizes the ancient practice of conducting such examinations upon written interrogatories only, adding that the practice has become more relaxed, and oral examinations have frequently, if not generally, obtained, which appears to be only a matter of convenience, not involving any principle of policy or right.¹ While, in an early case in Illinois, we find the supreme court of that state saying that witnesses may be examined in the master's office *viva voce*, or upon written interrogatories, and the evidence taken down and preserved by the master, so that the same may, if necessary, be used in court.²

Even so late as 1852 the question was raised in Georgia whether or not a party to a suit, when examined by the master in chancery, should be interrogated *viva voce*, or should be by interrogatories filed in writing, to which he should make answer, and the court held that unquestionably the better practice, either as to witnesses or a party, was to proceed *viva voce*; yet, in case of a party, the regular course was for counsel to prepare written interrogatories, which were then submitted to the master for his approval, and when approved, then handed over to the party to be examined, who, being allowed a reasonable time, returns his answer to the same.³ In coming to this conclusion, the court must have entirely overlooked the English Chancery Orders of 1828, which wholly changed the practice in this regard.

We find authority for the oral examination of witnesses frequently vested in the master by rule of court, or by statute. Thus we find United States Equity Rule 77 authorizing the master "to examine on oath, *viva voce*, all witnesses produced

¹ *Kirkman v. Vanlier*, 7 Ala. 217, 227, 228.

² *McDougald v. Dougherty*, 11 Ga. 570, 591.

³ *McClay v. Norris*, 4 Gilm. 870, 886.

by the parties before him;" while in New Jersey it is provided by statute: "That when any cause or matter shall be so referred to a master, it shall be lawful for him to take and hear the evidence of any or all witnesses in said cause or matter orally in the same manner as the evidence is now taken and heard in courts of law in this state on trials before a jury."¹ In Alabama the code provides for the *viva voce* examination of witnesses in proceedings before the register, but it omits to require that the evidence be taken down in writing. It is held to be the duty of the register, however, to reduce such examinations to writing.²

§ 226. Preparation for hearing.—Before beginning the taking of testimony in the master's office, it is well for counsel to ascertain the precise facts required to be established by proof, which is done, of course, by examination of the pleadings, and, to prevent any slip in this regard, a memorandum of such facts should be made, so that nothing will be forgotten, when the case is called. Such memorandum varies, of course, with the facts in each particular case, but the following is given as an illustration of such memorandum in a default foreclosure proceeding, where the mortgagee is seeking to recover his principal debt, interest, money paid out for taxes, insurance, and expenses of continuation of abstract, together with interest paid on a prior mortgage debt, under proper provisions covering each of these items in the second mortgage, and a reasonable solicitor's fee provided for by the mortgage.

Memorandum of Facts to be Established by Proof

First. Introduce principal notes in evidence.

Second. Coupon interest notes.

Third. Tax receipts.

Fourth. Show that insurance expired and amount paid for renewal. Introduce receipts.

¹ Rev. Stat. 1895, p. 897, § 149.

² Mahone v. Williams, 89 Ala. 202, 223.

Those having the curiosity to further investigate the old, cumbersome method of obtaining the evi-

dence in chancery cases, through interrogatories propounded by "examiners in chancery," are referred to chapter 8, Gresley's Eq. Evidence; Remsen v. Remsen, 2 Johns. Ch. 495.

Fifth. Introduce both mortgages and show amount of interest paid on debt secured by first mortgage.

Sixth. Prove amount paid out for continuation of abstract, and prove that this amount is the usual and customary charge for such work.

Seventh. Show by parol proof the usual and customary solicitor's fee for the services required.

By adopting this course counsel will be saved the mortification of now and then discovering that an important item of evidence has been forgotten, and the necessity of appealing to the indulgence of the master, or chancellor, for the privilege of supplying the omission.

§ 227. **Order of introduction of evidence.**—The natural and orderly method of introducing evidence is for the party upon whom the burden of proof rests, and, therefore, who has the opening, to introduce all the evidence relied upon to support his case. This is termed evidence in chief. After he rests the other party introduces his evidence in rebuttal, which may be either contradictory of the evidence in chief, or may limit or qualify the case made by his adversary, or an attack, by way of impeachment of the witnesses in chief. The party opening the evidence may then bring forward any evidence in rebuttal of that produced by his opponent, that is, any competent evidence calculated to deny or defeat the case as made by the latter, even though the result may be to corroborate the case as made by his evidence in chief.¹ But, while ordinarily, a party should introduce, before he closes, all the evidence he has to sustain the essential averments of his case, yet, as the object of introduction of evidence is to enable the court, or master, to come to a just conclusion upon all the facts relevant to the issue, the rule should not be so applied as to defeat the ends of justice; therefore, where, by a slip, mistake, or by inadvertence, a party fails to prove an essential fact, the court, or master, after he has closed his case, may allow him to introduce evidence to establish

¹ Chase v. Lee, 59 Mich. 237, 239, Walker v. Walker, 14 Ga. 242, 250; 26 N. W. 483, Johnston v. Jones, 1 Brayon v. Goulman, 1 T. B. Mon. Black (U. S.), 209, 216; Dodge v. 115, 118; 1 Gr. Ev., § 74; 2 Bouv. Dunham, 41 Ind. 186; Silverman v. Inst., § 3224 et seq. Foreman, 3 E. D. Smith (N. Y.), 322;

such fact or facts.¹ That is, the court may, in its discretion, depart from the rule and permit evidence in rebuttal which should have been offered in chief, but this is not a matter of right.² So, too, the natural and orderly method is, where evidence is admissible only on condition that other evidence is produced connecting it with the case, to first offer the connecting evidence, or, as it is termed, lay the proper foundation. But in actual practice it is often found difficult, if not impossible, to enforce the foregoing rules, theoretically so simple, and apparently so easy of application. Thus, it may be absolutely impossible, in a given case to first offer the connecting evidence. For example, the acts and declarations of one defendant in a case of conspiracy are inadmissible against a co-defendant until the fact of conspiracy is shown, yet cases arise where it is impossible to enforce this rule. The proof of the conspiracy may depend upon a vast amount of circumstantial evidence, a vast number of isolated and independent facts, and it may be that the whole evidence introduced, taken together, shows the actual existence of the conspiracy. In such a case it is immaterial at what stage of the proceedings such acts and declarations are admitted.³ Indeed, the very proof of conspiracy may be shown by the acts and conduct of others.⁴

In other cases, where it might be possible to apply the rule that the connecting evidence should first be offered, its enforcement would work great inconvenience, necessitating the sending of witnesses from the stand, and recalling them over and over again, and thus lead to a consumption of time which

¹ *Chase v. Lee*, 59 Mich. 237, 239, 26 N. W. 483; *Schumann v. Pilcher*, 36 Ill. App. 43; *Holmes v. Hinkle*, 63 Ind. 518, 523; *Humphrey v. State*, 78 Wis. 569, 47 N. W. 836; *Chicago, B. & Q. R. Co. v. Goracke*, 32 Neb. 90, 92, 48 N. W. 879, and cases cited; *Jacksonville, T. & K. W. R. Co. v. Peninsula, L. T. & M. Co.*, 27 Fla. 1, 155, 9 So. 661; *Thompson on Trials*, sec. 343-347.

² *Gilbert v. Gilbert*, 22 Ala. 529, 58 Am. Dec. 268; *Marshall v. Davies*, 78 N. Y. 414; *Agate v. Morrison*, 84 N. Y. 673; *Stewart v. State*, 111 Ind.

554, 13 N. E. 59; *Rosquist v. Furniture Co.*, 50 Minn. 192, 52 N. W. 385; *Holmes v. Hinkle*, 63 Ind. 518; *Dane v. Treat*, 35 Me. 198; *Harker v. State*, 8 Blackf. 540; *Schumann v. Pilcher*, 36 Ill. App. 43; *Humphrey v. State*, 78 Wis. 569, 47 N. W. 836; *C., B. & Q. R. Co. v. Goracke*, 32 Neb. 90, 48 N. W. 879; *J., T. & K. W. R. Co. v. Pen. Co.*, 27 Fla. 1, 9 So. 661.

³ *Spies v. People*, 122 Ill. 1, 238, 12 N. E. 865, 3 Am. St. R. 320.

⁴ *Id.* See also *Roscoe on Ev.* (7th ed.) 414, 415.

the court could ill afford, with any regard to the orderly dispatch of its business. . Cases not infrequently arise where the convenience of the witness, or of the court, or the party producing the witness, will be promoted by a relaxation of the rule, to permit the witness to be discharged from further attendance; and if the court, in such a case, should refuse to enforce the rule, it clearly would not be ground of error, unless it appear that it worked serious injury to the opposite party.¹

§ 228. Order of introduction — Continued.— It results, therefore, that the "mode of conducting a trial, the order of introducing evidence, and the time and place when it is to be introduced," are matters that necessarily rest largely in the sound discretion of the court, or master, and the rulings thereon will not be disturbed by the revising court, "unless there has been a clear abuse of discretion, which materially affects the rights of the party."² It is said that a party may introduce his evidence in any manner he may prefer;³ thus, he may first prove the acts and declarations of one claiming to be an agent, prior to the introduction of proof of agency;⁴ or he may first prove the value of services and afterward prove the contract to pay for the same.⁵ Of course, it must be understood that this is a matter, as above stated, resting largely in the sound discretion of the court. Where evidence is offered without laying a foundation therefor, the usual practice is for the court to require counsel to state that the proof will be produced necessary to make such evidence competent. But, even if counsel make such statement, such evidence should be ruled out, if it

¹ *Wills v. Russell*, 100 U. S. 621, 626.

² *Wills v. Russell*, 100 U. S. 621, 626; *Chase v. Lee*, 59 Mich. 237, 239, 240, 26 N. W. 483; *Spies v. The People*, 122 Ill. 1, 238, 12 N. E. 865, 8 Am. St. R. 320; *Burns v. Harris*, 66 Ind. 536, 541; *Crane v. The People*, 168 Ill. 395, 401, 48 N. E. 54; *Mayer v. Brensinger*, 180 Ill. 110, 120, 54 N. E. 159; *York v. Pease*, 2 Gray, 282; *Bell v. Jamison*, 102 Mo. 71, 75, 14 S. W. 714; *Goss v. Turner*, 21 Vt. 437, 439; *Marshall v. Davies*, 78 N. Y. 414, 419; *Blake v.*

Powell, 26 Kan. 320, 327; *Wells v. Kavanagh*, 74 Iowa, 372, 378, 37 N. W. 780; *Village of Ponca v. Crawford*, 18 Neb. 551, 555, 26 N. W. 365; *McClenghan v. Reid*, 84 Neb. 472, 478, 51 N. W. 1037; *Cassem v. Galvin*, 158 Ill. 30, 35, 41 N. E. 1087; *Johnston v. Jones*, 1 Black (U. S.), 209, 216; *Jackson v. Litch*, 62 Pa. St. 451, 455, 456.

³ *Mix v. Osby*, 62 Ill. 198; *Ginn v. Collins*, 48 Ind. 271, 275.

⁴ *Mix v. Osby*, *supra*.

⁵ *Ginn v. Collins*, *supra*.

appears that, under no possible contingency, can the evidence offered have any bearing upon the issues.¹

Where the line of defense is foreshadowed, so that the materiality of evidence offered may be seen, it is within the discretion of the court to permit the plaintiff to introduce evidence in advance, which otherwise would only be proper upon rebuttal.² But this matter rests entirely in the sound discretion of the court, and even if permitted it is a dangerous course to follow, because, having elected to enter upon the subject, the court may rule that he cannot again offer evidence on the same subject, after the defendant has concluded.³ The order of examination and cross-examination of witnesses is so much a matter within the discretion of the trial judge, that appellate courts seldom reverse on an exception in this regard, yet it is very important that the latitude should not extend to give an undue advantage to one party over another in the trial.⁴

These rules, as well as all others in the order of examination of witnesses and introduction of testimony, have for their object the eliciting of truth and the preservation of the equality of the rights of parties in trials in courts. Much, however, must still be left to the discretion of the judge. Neither the rule nor the exception must be allowed, if it can be prevented, unduly to prejudice parties.⁵ The master has, of course, the same discretion in controlling the order of introduction of evidence as the court, but the usual and orderly method should not be departed from unless the interest of justice demands it. In Michigan, it seems, as a matter of right, a party may, upon a hearing before commissioners of the circuit court, offer competent evidence at any time, and that he may offer as a matter of right at any time evidence which could only be introduced in other jurisdictions by special leave of the court.⁶

¹ *Clawson v. Lowry*, 7 Blackf. 140. Ry. & Mood. 254; 1 Greenl., secs. 74,

² *Dimick v. Downs*, 82 Ill. 570, 572; 481.

Williams v. Dewitt, 12 Ind. 309;

Hintz v. Graupner, 138 Ill. 158, 163, 531, 532.

27 N. E. 935.

³ *Williams v. Dewitt*, 12 Ind. 309,

310, 311; *York v. Pease*, 2 Gray, 283, 451, 455.

283, 284; *Holbrook v. McBride*, 4

Gray, 215, 218, 219; *Browne v. Murray*, 246.

⁴ *Helser v. McGrath*, 2 P. F. Smith,

531, 532.

⁵ *Helser v. McGrath*, 2 P. F. Smith,

531, 533; *Jackson v. Litch*, 62 Pa. St.

451, 455.

⁶ *Brown v. Brown*, 22 Mich. 242,

246.

§ 229. **Recalling a witness after he has been once examined.**—While the same rules govern the introduction of evidence upon a hearing in the master's office as obtain upon a trial in court, as we have already seen, yet it seems that a different rule applies to the recalling of a witness who has been once examined, either upon the hearing in court or before the master. This rule, as laid down over and over again, is, that a witness examined in chief upon the hearing cannot be re-examined before the master without an order of court, and then, not to any matter to which he has already been examined;¹ and a witness, once examined before the master, according to the strict rules, cannot be re-examined without an order of court,² and, it is said, that if a witness is so called and re-examined without an order of court permitting the same, his testimony should be suppressed.³ Some of the authorities limit the application of the foregoing rules by allowing the witnesses to be examined a second time as to new matters;⁴ and in other cases it is said that a master should not allow a witness to be recalled, except in such cases as the court itself would permit him to be re-examined.⁵

§ 230. **Recalling a witness after he has been once examined—Continued.**—The danger to be avoided is apparent, the object being to prevent parties, after having discovered "the weak parts of the adversary's case, or of their own," from hunting up or fabricating "testimony to meet the pressure or exigency of the inquiry,"⁶ and this, too, after the party has had an opportunity to "coach" the witness subsequent to

¹ *Browning v. Barton*, 2 Dick. 508; *Remsen v. Remsen*, 2 Johns. Ch. 494, 500; *Sawyer v. Bowyer*, 1 Bro. C. C. 340; s. c., 2 Dick. 689; *Sandford v. Paul*, 2 Dick. 750; *Greenaway v. Adams*, 13 Ves. 360; *Smith v. Althus*, 11 Ves. 565; *Birch v. Walker*, 2 Sch. & Lefr. 518; *Vaughan v. Lloyd*, 1 Cox, 313; *Smith v. Graham*, 2 Swan. 264; *Willan v. Willan*, 19 Ves. 590, *Rowley v. Adams*, 1 M. & K. 543, 545, *Whitaker v. Wright*, 8 Hare, 412, *England v. Downs*, 6 Beav. 269, 281, *Jenkins v. Eldridge*, 8 Story C. C. 299, *Fed. Cas.* 7,267; *Cowslade v. Cornish*, 2 Ves. Sr.

270; 1 Newland, Ch. Pr. 331; 2 Mad. Ch. Pr. 666; 2 Daniell, Ch. Pr. 1197.

² *Remsen v. Remsen*, 2 Johns. Ch. 494, 500; *Cowslade v. Cornish*, 2 Ves. 270; *Ex parte Saunderson*, 2 Cox. 196; *Trotter v. Trotter*, 5 Sim. 838; *Burgess v. Wilkinson*, 7 R. I. 31, 32; 2 Mad. Ch. Pr. 666; 1 Newland, Ch. Pr. 331; 2 Daniell, Ch. Pr. 1198.

³ *Bonner v. Young*, 68 Ala. 35.

⁴ *Hoffman*, Master in Chancery, 41 *et seq.*

⁵ *Patterson v. Scott*, 1 Grant's Ch. 582.

⁶ *Remsen v. Remsen*, 2 Johns. Ch. 494, 498.

the taking of his former testimony, or, as said by Lord Thurlow, that, "after seeing the first examination, the party might get him to amend his testimony;"¹ or, as stated by Lord Hardwicke: "If a witness is once examined, it might be dangerous without an order to let him be examined again; but that is from the danger of drawing in a witness, when it is known, what he has already sworn to."² In another case Lord Thurlow speaks of it as "the danger of perjury, which would be incurred by a witness deposing a second time to the same fact, after having seen where the cause pinched, and how his testimony bore upon it."³ Sir John Leach, master of the rolls, lays down the rule in emphatic terms, and, also, the reason for it. He says: "The rule is well settled, that a witness who has been examined in the cause cannot be examined again before the master, without an order; and such order is in general accompanied with a direction that he shall not be examined upon any points with respect to which he has been previously examined in the cause; for it would be too dangerous to truth and justice to afford to such a witness an opportunity of mending his testimony when he had found, by the evidence on the other side, where the weakness of the case lay. This is the general rule — but I do not admit it to be a universal one; for there may be special circumstances in which it becomes necessary, for the purposes of justice, to make an exception to the rule."⁴

§ 231. **Recalling a witness after he has been once examined — Continued.**— While the rule is as thus definitely stated and rigidly enforced whenever insisted upon, yet it is generally ignored in actual practice and a far looser one followed, the constant course now being to recall witnesses who have already testified, whenever it appears that justice requires it, leaving the question to the sound discretion of the master. In other words, in modern practice, the evidence being given *viva voce*, the hearing before the master is conducted in the same manner as a hearing before the chancellor where it rests solely within the discretion of the latter whether a witness, once examined in a cause, may be recalled. The actual practice being

¹ *Sandford v. Paul*, 2 Dick. 750, 753. 545. See also *Whitaker v. Wright*,

² *Cowslade v. Cornish*, 2 Ves. Sr. 270. 2 Hare, 322. For an examination of

³ *Vaughan v. Lloyd*, 1 Cox. 312, 313. this whole subject see *Gresley's Eq.*

⁴ *Rowley v. Adams*, 1 M. & K. 543, Ev. 194 *et seq.*

to follow the same course as in court, it may be stated as follows: The party calling a witness is required to examine him on every material point within the knowledge of the witness before he leaves the stand. The other party is then permitted to cross-examine on all matters brought out by the party calling the witness. The latter may then re-examine upon any new matter, if any, brought out in such cross-examination. The witness then goes from the stand and may not be recalled except by leave of the court. Such leave is within the sound discretion of the court, and will be given where a new point arises or where a material matter has been omitted by inadvertence or because the examiner had no knowledge of it at the time of the examination. The granting of such leave, where the interest of justice requires it, is but the exercise of a reasonable discretion by the court, and is no ground for a reversal unless injury has been occasioned thereby.¹ Yet, while this is the actual practice followed in the master's office, yet, whenever a party stands upon the objection to a witness being recalled who has once testified, the rule is still enforced, and, if the master overrules the objection, and allows the witness to testify without an order of court, the evidence of such witness will be suppressed, and the fact that witnesses are now examined *viva voce* in the master's office makes no difference. Long since the question was raised, whether, since the change of practice, permitting witnesses to be examined *viva voce* before the master, the above rules still apply. In *Rowley v. Adams*, 1 M. & K. 543, where the question arose upon the master's refusal to examine a witness *viva voce*, who had been previously examined in the cause, the master of the rolls seems clearly to have recognized the rule that a witness who has been examined in the case cannot be re-examined before the master without an order, as applying to a *viva voce* examination as well as to an examination upon interrogatories, and made a rule accordingly.²

§ 232. Recalling a witness after he has been once examined — Continued.— An application for an order permitting a re-examination of a party or witness is not of course, but in

¹ *Hunt v. Weir*, 29 Ill. 88; *Welsh v. People*, 17 Ill. 339; *Russell v. Martin*, 2 Scam. 492, 493; *Wilborn v. Odell*, 29 Ill. 456, 459; *Brown v. Berry*, 47 Ill. 175; *Northwestern Ry. Co. v. Hack*, 66 Ill. 238.
² 2 Daniell, Ch. Pr. 1198, note.

the discretion of the court. Lord Eldon said, "though the usual direction is to examine the parties as the master shall think fit, the practice had been long settled, that the master cannot, without an order, examine a party who has been previously examined; that it is not of course; but in the discretion of the court to grant or refuse it."¹ This rule is strictly followed in recent cases; thus, in Maryland the supreme court applied the rule, and, in its support, in passing on the question, stated that leave will not be given "unless it be satisfactorily shown to the court that there has been mistake, or inadvertent omission, in the previous examination. To afford witnesses facility of repeatedly amending their testimony, as the emergencies of the case may seem to require, would be extremely dangerous to truth and justice, and especially so where the parties themselves are the witnesses to be re-examined;"² and in a late case it is held by the same court that "it is important this rule should be observed, not only for the orderly conduct of an equity suit, but for the purpose of justice."³ Also in a recent federal case the rule is spoken of as a salutary one, and the testimony of certain witnesses who were re-examined in the master's office without an order of court was suppressed.⁴ So, too, the same rule is enforced in New Jersey, the chancellor remarking that, to examine a witness more than once without leave of the court, is opposed both to the policy and rules of the court.⁵ The rule is laid down by Greenleaf, and the reasons for its enforcement given, as above stated;⁶ where it is also said that leave to re-examine is generally granted on terms of having the interrogatories settled by the master.⁷ Upon appeal to the court for an order to re-examine, while such

¹ *Purcell v. M'Namara*, 17 Ves. 434. In this case the court entered the following order: "Let the master be at liberty to examine the defendant Margaret Purcell upon interrogatories to such of the points in this cause, to which she has not yet been examined, as the master shall think it reasonable that she should be examined to; and the master is to settle the interrogatories."

² *Trustees, etc. v. Heise*, 44 Md. (1876) 453, 466, 467.

³ *Girault v. Adams*, 61 Md. (1888) 1, 9.

⁴ *Thurber v. Cecil Nat. Bank*, 52 Fed. (C. C. D. Md., 1892), 518, 515.

⁵ *Delany v. Noble*, 8 N. J. Eq. 441, 444.

⁶ 3 Greenl. Ev., § 886.

⁷ See also *Trustees, etc. v. Heise*, 41 Md. 453, 466; *Vaughan v. Lloyd*, 1 Cox, 312. See also form of order in *Purcell v. M'Namara*, 17 Ves. 434, as given above.

order will not be entered as of course, yet the court will certainly grant leave whenever the substantial justice of the case requires it.¹

§ 233. **Competency of witnesses.**—As the general rules of evidence are applicable to hearings in the master's office, as has been already shown, it follows that all persons who are competent to be examined as witnesses in a cause upon a hearing in court are competent to give evidence before the master upon inquiries directed by the court.² A party may waive the incompetency of a witness produced against him.³ If he is aware of the incompetency of the witness, he must object before he is examined; he will not be permitted to cross-examine him, and then, if he dislikes his testimony, object to his competency.⁴ A party who neglects to interpose an objection to the competency of a witness, known when he is called to testify, must be considered as waiving it, and he will not be permitted to raise it at any subsequent stage of the litigation.⁵ The rule that an objection to the incompetency of a witness must be interposed at the time of his examination is designed not only to enable the party offering the witness to remove the incompetency if practicable, or to supply, by other evidence, the want of such testimony, as suggested in the cases of *Neville v. Demeritt*⁶ and *Mohawk Bank v. Atwater*,⁷ but rests upon another reason of greater cogency, which does not permit the adverse party to sit by and hear the witness examined without objection, and, failing to make anything out of him, to interpose an objection to his competency.⁸ "The most important object of the rule is to secure fairness in practice and to prevent all attempts at tricks unbecoming the administration of justice."⁹ If the incompetency is known at the time the witness is sworn, the adverse party is bound to interpose

¹ *Vaughan v. Lloyd*, 1 Cox, 312.

² 1 *Barbour*, Ch. Pr. 497.

³ *Boone v. Ridgway's Ex'rs*, 29 N. J. Eq. 543; *Berryman v. Graham*, 21 N. J. Eq. 370, 372; *Walker v. Hill's Ex'rs*, 22 N. J. Eq. 513.

⁴ *Boone v. Ridgway's Ex'rs*, 29 N. J. Eq. 543, 545; 1 *Greenl. Ev.*, § 421.

⁵ *Boone v. Ridgway's Ex'rs*, *supra*; *Donelson v. Taylor*, 8 Pick. 389, 391;

Neville v. Demeritt, 2 N. J. Eq. 321; *Graham v. Berryman*, 19 N. J. Eq. 29; *Berryman v. Graham*, 21 N. J. Eq. 370, 372.

⁶ 2 N. J. Eq. 321, 334.

⁷ 2 *Paige*, 54, 60.

⁸ *Berryman v. Graham*, 21 N. J. Eq. 370; *Boone v. Ridgway's Ex'rs*, 29 N. J. Eq. 543, 546.

⁹ *Id.*

in controversy may be given in evidence against him, but he is not permitted to introduce such evidence in his own favor. Yet there are circumstances under which such evidence is admissible, to-wit: where it is part of the *res gestæ*. When a statement may be regarded as made almost involuntarily without time for reflection, and when the mind of the party making it is vividly impressed with the true cause of injury, it is admissible as part of the *res gestæ*. Such statements which are not a narrative of past transactions, but which spring naturally and without premeditation from the lips of an injured person in the very presence of the circumstances which have produced the injury, and while the victim is perhaps writhing in pain, are of the highest value as evidence.¹

Take another illustration. It is a well known rule that if a contract is reduced to writing, the writing is the best evidence of its terms, and all oral statements made by the parties are excluded. The exception is, where a third party is attacking it he can by parol proof show the actual terms of the contract, although by so doing it contradicts the writing. Written instruments are, as to third parties, but the statements of others in writing, by which, of course, they cannot be concluded.² Another well recognized exception to this rule is where one of the parties is charging that he was induced to enter into the contract by fraud perpetrated by the other party. In such a case all previous and contemporaneous oral statements may be shown in evidence. Another exception to the rule is, where the writing is absolutely silent upon a subject, parol evidence is admissible upon *that subject*.³ This exception applies to records as well as other writings.⁴

¹ Cross Lake Logging Co. v. Joyce, 55 U. S. App. 221, 225; Penn. R. Co. v. Lyons, 129 Pa. St. 113, 121, 18 Atl. 759, 15 Am. St. R. 701; Louisville, New Albany & Chi. Ry. Co. v. Buck, 116 Ind. 566, 576, 19 N. E. 453, 2 L. R. A. 520, 9 Am. St. R. 888, and large number of cases cited in the opinion.

² Edgerly v. Emerson, 23 N. H. 555, 55 Am. Dec. 207; Badger v. Jones, 12 Pick. 371; Johnson v. Blackman, 11 Conn. 342, 351; Overseers, etc. v. Norwich, 10 John. 229; Washburn, etc. v. Chi. Gal. Iron Fence Co., 109 Ill.

71, 79; Schultz v. Plankinton Bank, 141 Ill. 120, 30 N. E. 346. See Brief Book and 97 Fed. Rep. (See cases cited 109 Ill. 71, 79.)

³ Ball v. Benjamin, 73 Ill. 89; Merch. Dispatch Co. v. Furthmann, 47 Ill. App. 561, 566; Welz v. Rhodius, 87 Ind. 1, 44 Am. R. 747, and large number of cases cited in the opinion; Stephen, Dig. of Law of Ev., art. 90; 1 Greenleaf on Ev., secs. 284a, 286.

⁴ Shepard v. Butterfield, 41 Ill. 76; Barger v. Hobbs, 67 Ill. 592, 598.

These examples of well established

§ 235. **Admissibility — Continued — The issues.**— As we have already seen in a preceding section, evidence to be admissible must have a bearing upon the issues submitted to the master for hearing. This, of course, necessitates a careful examination of the order of reference and the pleadings.¹ Evidence to be admissible must be to some allegations or facts charged in the bill or answer, and thus put in issue by the parties. If evidence be admitted which is improper under this rule it will be disregarded by the court.² It is improper for the master to admit evidence upon any subject not embraced within the order of reference and the actual issues involved. All else is irrelevant and only tends to confusion. Besides, when a party comes to investigate the matters referred to the master upon the principles of the decree, he is taken by surprise if evidence is offered and admitted which is foreign to the issues as submitted. Such evidence cannot be looked at for any purpose and ought not to be taken by the master. Evidence upon irrelevant matters is taken without authority, "and is as little to be regarded as though it were found in voluntary affidavits, sworn to before a justice of the peace."³ If there is no issue made by the pleadings under which evidence offered is admissible, such evidence is irrelevant and furnishes no basis for a decree.⁴ Evidence to be admissible must have its foundation in the pleadings.⁵ It is not necessary that evidence to be admissible should be the strongest evidence of the matter in dispute, but only, from the nature of the case, the best grade or quality of evidence within the power of the party offering it.

rules and just as well recognized exceptions are given to show the importance of the caution given in the text.

¹ In this connection reference is made to ch. 4, §§ 150-166, where the power of the master dependent on the order of reference and pleadings is fully discussed.

² *Langdon v. Goddard*, 2 Story R. 267, Fed. Cas. 8,060.

³ *Maury v. Lewis*, 10 Yerg. (Tenn.) 115, 120.

⁴ *Shaw v. Patterson*, 2 Tenn. Ch. 171, 184, 185; *Gordon v. Gordon*, 3

Swans, 400, 472; *Browning v. Pratt*, 2 Dev. Eq. 44, 49; *Vansciver v. Bryan*, 2 Beas. (13 N. J. Eq.) 484, 436; *Whaley v. Norton*, 1 Vern. 488; *Williams v. Llewellyn*, 2 Younge & Jervis, 68; *Blake v. Marnell*, 2 Ball & Beatty, 35, 47; *James v. M'Kernon*, 6 Johns. R. 543, 565; *Clarke v. Jurtton*, 11 Ves. 240; *Sidney v. Sidney*, 3 P. Wms. 268, 276.

⁵ *Page v. Greeley*, 75 Ill. 400; *Jefferson v. Jefferson*, 96 Ill. 551; *Penna. Co. v. Frana*, 112 Ill. 398, 403; *Vigus v. O'Bannon*, 118 Ill. 334, 339, 8 N. E. 778.

To illustrate, the contents of a written instrument must be proven by the production of the document itself, but all witnesses are competent to prove a fact, although, from the very nature of the case, one may be far better than others.¹

Issues of fact are made up in courts of record by formal written pleadings of the parties. An issue, in this sense, may be defined as a single and material point arising out of the allegations or pleadings of the parties, and generally made by an affirmative allegation by one party and a denial by the other.² Whenever the parties come to a point in the pleadings which is affirmed on one side and denied on the other, they are said to be at issue; and when a material fact is thus affirmed and denied an issue of fact is formed for trial.³ It is in this manner that issues of fact are made up and afterward, by an order of court, submitted to the master for trial. It must be understood that these remarks apply to the main issues, because minor issues of fact constantly arise during the trial of a cause and which only have a bearing as going to prove or disprove the main issues of fact submitted. These, for convenience, may be properly designated as evidentiary facts. For example, the defendant admits the bond or note sued upon, but alleges payment, which is denied. The issue submitted then is, was this debt paid or not, with the burden resting on the defendant. He goes on the stand and swears that he paid the debt to the plaintiff on the 14th day of June at the First National Bank in Chicago. The plaintiff takes the stand and states that this is not true, that he resides in New York City and was not in Chicago on the 14th of June. Counsel for defendant, in rebuttal, introduces the register of a hotel in Chicago where the name of the plaintiff is registered on June 14th and proves the handwriting to be that of the plaintiff. The plaintiff again takes the stand and denies that the name so registered is his signature and introduces witnesses who corroborate him. Here it is a contested *fact* whether the defendant and plaintiff were at the hotel on the 14th of June as bearing upon the question whether payment was made as alleged. Again, it is a con-

¹ Vigus v. O'Bannon, 118 Ill. 334, 348; Barnum v. Barnum, 9 Conn. 242; 1 Halsted's Law of Evidence, 156.

² Gould's Pl. 279; Anderson, Law Dic.; Washington v. L. & H. Ry. Co., 136 Ill. 49, 52, 26 N. E. 653.

³ Id.

tested fact whether the name in the hotel register is in the handwriting of the plaintiff as bearing on the question of whether the plaintiff was there on that day, but these contested questions of fact are not *issues made up by the pleadings*, but are merely evidentiary issues contested and investigated solely and only because of the bearing which the result may have upon the issue actually submitted. As the master must obey the order of reference it follows that he, the master, cannot hear evidence bearing on questions already settled in the order of reference.¹

§ 236. **Admissibility — Liberal rule — Harmless error.**— In the case of the *Kansas Loan & Trust Co. v. Electric Ry. Co.*² the court observes: "That at the hearing before the master, where the evidence is offered and its competency or admissibility is objected to by the adverse party, the master should receive the evidence, subject to the objection, and the court would be able then to pass upon the matter on review." To the same effect the Illinois supreme court say: "As a general rule we think the better practice in chancery cases is to submit the evidence, subject to such objections as may be taken to it, till the final hearing, when the court will disregard it, if incompetent, or if not, give such weight to it as it may be entitled to; and it is not necessary for the court, in its decree, to pass upon these questions, the presumption being that it considered all competent and relevant testimony, and none other."³

This liberal rule is permitted in chancery cases because of another rule, applicable in that class of cases, holding that the admission of incompetent evidence is a "harmless error," provided there is competent evidence in the record to sustain the finding; in other words, in that class of cases it is not error for the court, or master, to permit incompetent evidence to be heard, subject to objection; for the reason that it will be presumed that the court or master, in forming conclusions, acted on the competent evidence alone, and to have disre-

¹ *Maury v. Lewis*, 10 Yerger, 115; *Rishton v. Grissell*, L. R. 5 Eq. 326. *Remsen v. Remsen*, 2 Johns. Ch. 495; See *ante*, §§ 160, 162.

Kay v. Fowler, 7 Monroe, 593; *Simmons v. Jacobs*, 52 Me. 147, 152; ² 108 Fed. 702.

³ *Gordon v. Reynolds*, 114 Ill. 118, 125, 28 N. E. 455.

garded the incompetent.¹ It is also said that, as the verdict of a jury, in a chancery case, is advisory only, the same rule is applied in case of an issue out of chancery heard before the chancellor and a jury.² The same rule applies to a hearing in the master's office.³

There is one class of cases where this liberal rule in regard to the admission of evidence is especially applicable, viz.: in the investigation of charges of fraud. On a question of fraud the evidence must necessarily take a pretty wide range, and may embrace all facts and circumstances which go to make up the transaction, disclose its true character, explain the acts of the parties, and throw light on their objects and intentions.⁴ In such cases courts should be liberal in the receipt of evidence tending to disclose the true nature of the transaction. Very slight circumstances, apparently trivial in themselves, when joined with other facts, may afford irrefragable proof of fraud.⁵ "The jurisdiction of equity over fraud is all-embracing. None of its protean shapes can be allowed to elude the searching investigations of the chancellor. No human ingenuity can devise a plan for the protection of fraud."⁶

§ 237. Admissibility — Liberal rule — Harmless error — Continued.—Proof of fraudulent or collusive acts is nearly always difficult. Fraud lurks in the dark. Its ways are devious, often, and at all times intended to be hidden, and if brought to light it must usually be by the means of presumptive or circumstantial evidence,—not presumptions of law, but presumptions of fact, which differ from presumptions of law in this essential respect: "that while those are reduced to fixed rules and constitute a branch of the particular system of jurisprudence to which they belong, these merely natural presumptions are derived wholly and directly from the circumstances of the particular case, by means of the common ex-

¹ Coffey v. Coffey, 179 Ill. 283, 291, 53 N. E. 590; Swift v. Castle, 23 Ill. 209, 214, 215.

² Peabody v. Kendall, 145 Ill. 519, 526, 32 N. E. 674.

³ For a full discussion of this doctrine see "Harmless Error," *post*, §§ 498, 499.

⁴ Smalley v. Hale, 37 Mo. 102, 104.

⁵ Vigus v. O'Bannon, 118 Ill. 334, 347; Bigelow on Fraud, 146, 147; Stauffer v. Young, 39 Pa. St. 455, 460; 2 Rice on Ev., p. 953.

⁶ Myrick v. Jacks, 33 Ark. 425, 429.

perience of mankind, without the aid or control of any rules of law whatever."¹

"The affairs of men consist of a complication of circumstances so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstance, and in its turn becomes the prolific parent of others, and each, during its existence, has its inseparable attributes, and its kindred facts materially affecting its character, and essential to be known in order to a right understanding of its nature. These surrounding circumstances constituting a part of the *res gestæ*, may always be shown to a jury along with the principal fact."² Hence a promissory note or other written instrument tainted with a charge of usury, or made upon a fraudulent consideration, or for a gambling debt, may be contradicted and the true character of the transaction shown. It is not alone the last words spoken or written that in all cases give character to a transaction.³ Upon the hearing of a cause involving the transfers of property charged to be fraudulent, the party claiming such transfers to have been made in bad faith will, on cross-examination, be permitted to make a complete and thorough investigation of all questions involved, especially where previous answers of the witness have been evasive.⁴ Yet, while these rules relative to the liberal admission of evidence and "harmless error" are well recognized, where evidence is clearly inadmissible for any purpose, it is the duty of the master to exclude it.

§ 238. Admissibility — Liberal rule — Harmless error — Continued.—The practice of admitting evidence not warranted by the issues and not proper under the order of reference as it stands, against objection, and then recommending to the court to grant leave to amend the pleadings so as to make new issues to fit it, is certainly reprehensible and should not be encouraged by the courts. The master should never forget that it is no part of his duty to devise ways and means to enable the complainant to maintain his case against the de-

¹1 Greenleaf on Evidence, 44. See Podolski v. Stone, 186 Ill. 540, 549, 58 N. E. 340.

² Brand v. Henderson, 107 Ill. 141, 145.

⁴ Allen v. Fortier, 87 Minn. 218, 84

³1 Greenleaf's Ev., § 108; Brand v. Henderson, 107 Ill. 141, 144. N. W. 21.

fendant, or to aid the defendant to interpose a successful defense against the complainant's bill. The admission of evidence not proper under the issues as they stand, on the theory that the court will permit amendments of the pleadings so as to make such evidence available to the party offering it, is worse than time thrown away if the court should take a different view of it from the master and deny the right of amendment. Much the safer course for the master is to carefully confine himself to the issues as made by the pleadings and to the authority vested in him by the order of reference, and then, if the issues are not what they ought to be, or if the order of reference is not broad enough, leave the responsibility where it belongs, that is, upon the parties themselves and the court. The logical course is for the court to see that the issues are sharp and well defined and that the order of reference is not ambiguous, and then send the case to the master to hear and report. If during the hearing before the master either party deems it necessary to set up other facts or put in issue other matters and to have them included in the reference, he should apply to the court for leave to amend the pleadings and ask that the order of reference be enlarged so as to include such new matters.¹

§ 239. **Admissibility — Hearsay.**— The general rule is that hearsay evidence is inadmissible; but to this rule there are some exceptions which are said to be as old as the rule itself, such as cases of pedigree, of prescription, of custom, and in some cases of boundary.² It is just as improper to admit hearsay evidence upon a hearing before a master or a referee as upon a trial in court, and, in a case before a referee where a large amount of the evidence consisted of hearsay, so that evi-

¹ Connor v. Edwards, 36 S. C. 563; Gordon v. Hobart, 2 Story R. 243, 261, Fed. Cas. 5,608. See this chapter, div. 12, "Amendment of Pleadings," *post*, §§ 305-311.

² Mima Queen v. Hepburn, 7 Cranch, 290, 296; Clement v. Packer, 125 U. S. 309, 321, 8 Sup. Ct. R. 907. For discussion of admissibility of hearsay evidence on questions as to boundary, see *Id.*; also Boardman v. Lessees of Reed, 6 Pet. 328, 341;

Caufman v. Presbyterian Congregation of Cedar Spring, 6 Binney, 59; Kennedy v. Lubold, 88 Pa. St. 246; Kramer v. Goodlander, 98 Pa. St. 366; McCausland v. Fleming, 63 Pa. St. 36, 38; Conn v. Penn, 1 Peters, C. C. 496, 511, Fed. Cas. 3,104; Bender v. Pitzer, 27 Pa. St. 333, 335; Hamilton v. Menor, 2 S. & R. 70; Hunnicutt v. Peyton, 102 U. S. 333; Elliott v. Pearl, 10 Pet. 412.

vidently it influenced the findings of fact, the report was set aside.¹

§ 240. Admissibility — Expert and opinion evidence.—

The general rule is, that the opinions of witnesses are inadmissible as evidence; that they are to testify to facts, and the court, jury or master, as the case may be, is to draw the inferences and form the opinions which are to govern the case.² But upon questions of science, skill or trade, or others of a like kind, persons of skill, sometimes called *experts*, are permitted to give their opinions in evidence.³ For example, experts, or persons instructed by experience, “men of science,” as Lord Mansfield called them,⁴ may give their opinions upon questions of science, skill or trade, as to the seaworthiness of ships, or their skilful navigation, the genuineness of handwriting, the cause of disease and death, the consequences of wounds, the sanity or insanity of a person’s mind, or others of a like kind.⁵ This exception to the general rule is based on the ground of necessity; that is, that when the facts in issue are not themselves accessible by evidence, it is a matter of necessity to call in the experienced or instructed opinion of such witnesses. Such opinions should not be received as evidence, where all the facts on which such opinions are founded can be ascertained and made intelligible to the court, master or jury, as the case may be.⁶ The rule of exclusion is thus accurately stated by Scholfield, J., who, speaking for the Illinois supreme court, in deciding that certain expert evidence was inadmissible, says: “The subject-matter of inquiry is not such that only persons of skill and experience in it are capable of forming a correct judgment upon it, or, in other words, it does not so far partake

¹ De la Riva v. Berreyesa, 2 Cal. 195.

² City of Chicago v. McGiven, 78 Ill. 347, 349.

³ City of Chicago v. McGiven, 78 Ill. 347, 349; Grigsby v. Clear Lake Water Co., 40 Cal. 396; Ohio & Miss. R. R. v. Webb, 142 Ill. 404, 406, 407, 82 N. E. 527; Higgins v. Dewey, 107 Mass. 494, 9 Am. R. 68; Stumora v. Shaw, 68 Md. 11, 11 Atl. 360; Railway Co. v. Kellogg, 94 U. S. 469, 472. See Clason v. City of Milwaukee, 30 Wis.

316; Ohio & Miss. Ry. Co. v. Neutzel, 148 Ill. 46, 32 N. E. 529; Insurance Co. v. Tobin, 32 Ohio St. 77; Lawson, Expert and Opinion Ev., p. 5.

⁴ Folkes v. Chadd, 3 Doug. 157.

⁵ Linn v. Sigsbee, 67 Ill. 75, 81.

⁶ City of Chicago v. McGiven, 78 Ill. 347, 349; Clark v. Fisher, 1 Paige, 171, 173-74, 19 Am. Dec. 402; Mayor, etc. of New York v. Pentz, 24 Wend. 663; Lawson, Ex. and Op. Ev., pp. 203, 204; Rogers, Expert Testimony, § 8.

of the nature of a science as to require a course of previous habit or study in order to the attainment of a knowledge of it."¹

§ 241. **Admissibility — Expert and opinion evidence — Continued.**—When the subject of the proposed inquiry is a matter of common observation, upon which the lay or uneducated mind is capable of forming a correct judgment, experts are not permitted to state their conclusions. In questions of science their opinions are received, for in such questions scientific men have superior knowledge and generally think alike. Not so in matters of common knowledge.² "Whenever the subject matter of inquiry is of such a character that it may be presumed to lie within the common experience of all men of common education moving in the ordinary walks of life, the rule is that the opinions of experts are inadmissible, as the jury are supposed in all such matters to be entirely competent to draw the necessary inferences from the facts testified to by the witnesses."³ As a general rule, the opinions of witnesses are not to be received in evidence merely because such witnesses may have had some experience or greater opportunities of observation than others, unless such opinions relate to matters of skill and science.⁴ Where the matter inquired about requires no special knowledge, and may be determined by a jury upon a sufficient description of the facts in regard to it, it is not proper to receive the testimony of experts.⁵ For example, an expert cannot be asked whether the time during which a railroad train stopped was sufficient to enable the passengers to get off,⁶ or whether it was prudent to blow a whistle at a par-

¹ *Pennsylvania Co. v. Conlan*, 101 Ill. 93, 105. See also *Wight Fire Proofing Co. v. Pocekai*, 130 Ill. 139, 145, 22 N. E. 543; *Chicago & Alton R. R. Co. v. Springfield, etc. R. R. Co.*, 67 Ill. 142, 145; *Linn v. Sigsbee*, 67 Ill. 75, 81; *City of Chicago v. McGiven*, 78 Ill. 347, 349; *Hopkins v. Ind. & St. L. R. R. Co.*, 78 Ill. 32.

² *Milwaukee & St. Paul R. Co. v. Kellogg*, 94 U. S. 469.

³ *Rogers on Expert Testimony*, § 8; *Ohio & Mississippi R. Co. v. Webb*, 142 Ill. 404, 32 N. E. 527.

⁴ *Robertson v. Stark*, 15 N. H. 109;

Marshall v. Columbian Ins. Co., 7 Fost. (N. H.) 157; *Protection Ins. Co. v. Harmer*, 2 Ohio St. 452; *People v. Bodine*, 1 Denio, 281; *Westlake v. St. Lawrence, etc. Ins. Co.*, 14 Barb. 206; *Smith v. Gugerty*, 4 Barb. 614; *Folkes v. Chudd*, 3 Doug. 157; 1 *Smith's Lead. Cas.* (5th Am. ed.) 630; *Daniels v. Mosher*, 2 Mich. 183.

⁵ *Hopkins v. Indianapolis & St. Louis R. Co.*, 78 Ill. 32; *City of Chicago v. McGiven*, id. 347; *Pennsylvania Co. v. Conlan*, 101 id. 93.

⁶ *Keller v. Railroad Co.*, 2 Abb. App. Dec. 480.

ticular time.¹ Nor can a person conversant with real estate be asked respecting the peculiar liability of unoccupied buildings to fire.² So, too, the probable effect of taking all the stakes from one side of a car loaded with lumber, being a matter of the operation of natural laws within the observation of everybody, is not a matter for expert testimony.³ Again, the opinions of witnesses should not be asked in such a way as to cover the very question to be found by a court or jury.⁴

§ 242. **Expert and opinion evidence — Value or weight of.**— Experience demonstrates that evidence based upon opinions is always the most unsatisfactory and the least to be depended upon. Our opinions are much more frequently founded on prejudices, or biased by our feelings, than we are aware of. Hence it frequently happens that two witnesses, equally honest and intelligent, form opinions directly opposite to each other, founded on the same state of facts. It is for this reason that such evidence is only admissible in cases of necessity.⁵ In weighing the testimony of conflicting witnesses in cases of this character its weight will not depend so much upon the number as upon the intelligence of the witnesses, and their capacity to form correct opinions, their means of information, the unprejudiced state of their minds, and the nature of the facts testified to in supporting those opinions.⁶

§ 243. **Admissibility — Documents previously read on hearing.**— Rule 80 of the United States Equity Rules provides that "all affidavits, depositions and documents which have been previously made, read, or used in the court, upon any proceeding in any cause or matter, may be used before the master." Under this rule it was held that, while such testimony may be used before the master, yet this must be understood to mean that it may be brought before him without being retaken, by calling his attention to the parts relied upon in making up the case, when the opposite side may know

¹ *Hill v. Railroad Co.*, 55 Me. 438. *Springfield & Northwestern R. R.*

² *Mulry v. Insurance Co.*, 5 Gray, 541. *Co.* 67 Ill. 143.

³ *Hughes v. Richter*, 161 Ill. 409, 48 ⁵ *Clark v. Fisher*, 1 Paige, 171, 173, 19 Am. Dec. 402.

N. E. 1006. As to this whole section ⁶ *Id.* For general rules governing the weight to be given to opinion evidence, see *post*, § 855.

see *Hellyer v. People*, 186 Ill. 550, 558, 559, 58 N. E. 245.

⁴ *Chicago & Alton R. R. Co. v.*

what part is so brought into the hearing and relied upon; and that, in a case where exceptions were filed to the refusal of the master to consider testimony not so brought in, his ruling was correct; the court remarking: "The master, therefore, had no basis for doing what this exception is for not doing."¹ Under the foregoing rule every kind of evidence that has been already used in the cause, that is to say, put in, and entered as read, may be produced before the master, without further preliminary; or it may be more broadly stated, that "every sort of evidence which can be used at the hearing may also be used before the master." The hearing here referred to is the first hearing on the motion for a reference to the master.² In Alabama, section 744 of the code is a literal copy of United States Equity Rule 80. Under these rules evidence taken in a cause, though not read at the hearing, may be received by the master.³ All papers used before the master as evidence should be regularly offered in evidence so that either party may have an opportunity to explain or rebut them,⁴ otherwise they cannot be referred to in argument or used in preparing the report.⁵ Daniell even goes so far as to say that the rule which precludes the reading of any evidence which was not before the master, also precludes the reading of any parts of defendant's answer which were not read in the master's office.⁶

§ 244. Admissibility — Affidavits.— The United States Equity Rule, quoted in the preceding section, provides that all affidavits which have been previously made, read or used in court, upon any proceeding, may be used before the master. It was not the intention of this rule to make any change in the law of evidence relative to the admission of affidavits, but simply means that affidavits and other documents which have already been prepared and used in the case may be used before the master.⁷ This Rule 80 is almost a literal copy of Order No. 65 of the English Chancery Orders of 1828.⁸ It has been held in an English case that wherever

¹ Bell v. United States Stamping Co. (U. S. Cir. Ct. S. Dist. N. Y.), 82 Fed. 549.

² Gresley's Eq. Ev. 503, 505; Smith v. Atkins, 11 Ves. 564.

³ 2 Maddock's Ch. Prac. 676; Calow v. Mince, 2 Vern. 472.

⁴ Bell v. U. S. Stamping Co., 32 Fed. R. 549.

⁵ See Id.

⁶ 2 Ch. Pr. (6th ed.) 1318.

⁷ 1 Barbour, Ch. Pr. 496; 1 Smith, Ch. Pr. (Ed. 1834) 41, 567.

⁸ Smith, *loc. cit.*

the court is justified in proceeding upon affidavits, the master may also admit affidavits in evidence before him.¹ All that is meant is that affidavits read in court in support of any petition or motion competent to be heard on affidavits, such affidavits already taken and used in court may be used before the master, to establish any fact which might be proven by affidavits upon a hearing in court.² It was the intention of the rule to simply save the labor of rewriting papers already prepared. Affidavits may be read in evidence on the hearing before the master by consent of all parties.³ The master cannot proceed upon any inquiry before him, by affidavit, without such consent, for this reason: that the proceeding by affidavit does not afford the opportunity for cross-examination.⁴ Affidavits may be read in evidence before a master if no objection is made to their competency. If the other party desires to object to their introduction he should interpose his objection when they are offered and require the master to note his objection upon his minutes. Unless this is done he cannot afterward question their competency as evidence.⁵

§245. Admissibility — Affidavits — Continued.— Affidavits are not competent evidence upon a hearing before a master, but, if they are admitted without objection, the parties cannot complain.⁶ A failure to object to them when offered as evidence renders them competent.⁷ It is not proper practice for an attorney to act as notary and administer oaths to parties in a cause in which he is employed. By statute in Kansas

¹ *Sonnett v. Powell ex rel.*, cited in *Seton's Forms of Decrees*, p. 22. Cited, also, 1 *Hoffman*, Ch. Pr. 522, note.

² *Bell v. United States Stamping Co.* (U. S. Cir. Ct. S. Dist. N. Y.) 32 Fed. 549; 1 *Newland*, Ch. Pr. 332.

³ *Willan v. Willan*, 19 *Ves. Jr.* 590, 593.

⁴ *Rowley v. Adams*, 1 *Myl. & K.* 543, 545; 2 *Smith*, Ch. Pr. (ed. 1834) 129.

⁵ *Pearson v. Darrington*, 32 *Ala.* 237, 245.

⁶ *Bowers v. Bowers*, 29 *Gratt.* 697; *Boston Iron Co. v. King*, 2 *Cush.* 400; *Bank v. Sprague*, 23 *N. J. Eq.* 81;

Ballard v. White, 2 *Hare*, 158; *Baker v. Harwood*, 1 *Hare*, 328; *Bowden v. Parrish*, 86 *Va.* 67, 9 *S. E.* 616, 19 *Am. St.* 873; *Vanderwick v. Summerl.*, 2 *Wash. C. C.* 41, *Fed. Cas.* 16,845; *Hatch v. L. & S. R. R. Co.*, 11 *Bissell*, 138, 9 *Fed.* 856.

⁷ *Hawkins v. Taber*, 47 *Ill.* 459. As to the use of affidavits as evidence upon a reference to masters, see also *Morgan v. Lewis*, 1 *Newl.* 833; *Cumming v. Waggoner*, 7 *Paige*, 603; *Sonnet v. Powell*, *Seton*, 22; *Daniell*, Ch. Pr. 1189-1191; *Rowley v. Adams*, 1 *M. & K.* 545; *Willan v. Willan*, 19 *Ves.* 590-593.

and Michigan an attorney is made incompetent to act as an officer and administer oaths in a suit in which he is employed, and that practice is against the rules in England and New York, and is generally discountenanced.¹ Such a proceeding is not a nullity, and a failure of the opposite party to take advantage of it in apt time is a waiver of the irregularity, if it be one.² Affidavits sworn to in a foreign country, or in another state, must have a certificate of a notary or other officer administering the oath, to the effect that he is authorized by the laws of his country, or state, to administer oaths, and failure in this regard renders the affidavit void and not proper to be considered by the court.³

As to the construction of an affidavit, it, like a pleading, must state facts. Matters stated as conclusions, or simply as opinion or belief, will be of no avail.⁴ It is presumed to be as strong as the party can make it.⁵ An omission to state a matter which, if true, would be to the interest of the party is presumed to have been omitted because the fact was against him; in other words, in weighing the value of an affidavit, it will, like a pleading, be construed most strongly against the party making it.⁶ All statements which are mere conclusions of the witness are entitled to no weight whatever.⁷ All other matters except statements of fact are of no weight whatever, and are to be wholly disregarded.⁸ An affidavit should set forth facts specifically; mere general denials, or general comments, involving questions of law as well as fact, are insufficient.⁹ So,

¹ Phillips v. Phillips, 185 Ill. 629, 632, 57 N. E. 796; Hopkinson v. Buckley, 8 Taunt. 74; Taylor v. Hatch, 12 Johns. 340; Warner v. Warner, 11 Kans. 121; Tootle v. Smith, 34 Kans. 27.

² Gilmore v. Hempstead, 4 How. Pr. 153; Linck v. City of Litchfield, 141 Ill. 469, 478, 31 N. E. 128; In re Hogan, 8 Atk. 812.

³ Smith v. Lyons, 80 Ill. 600; Ferris v. Commercial Nat. Bank, 158 Ill. 237, 241, 41 N. E. 1118; Revised Stat. of Illinois, ch. 101, § 6.

⁴ Ferris v. Commercial Nat. Bank, 158 Ill. 237, 241, 41 N. E. 1118.

⁵ Steele v. People, 45 Ill. 152, 155;

Slate v. Eisenmeyer, 94 Ill. 96; Dacey v. People, 116 Ill. 555, 6 N. E. 169.

⁶ Whiteside v. Pulliam, 25 Ill. 285, 288.

⁷ Baker v. Akerman, 77 Ga. 89; Schultz v. Plankinton Bank, 40 Ill. App. 462, 470; Gould v. Gage, 118 Pa. St. 559, 12 Atl. 476; Erie City v. Butler, 120 Pa. St. 374, 14 Atl. 153.

⁸ Railway Co. v. Clark, 70 Ill. 276, 280; Slate v. Eisenmeyer, 94 Ill. 96; Chicago City Ry. Co. v. Duffin, 126 Ill. 100, 102, 18 N. E. 279.

⁹ Noble v. Kreuzkamp, 111 Pa. St. 68; McBain v. Enloe, 13 Ill. 76; Moody v. People, 20 Ill. 315; Steele v. People, 45 Ill. 152.

too, an affidavit must state facts within the knowledge of the witness. It is not enough to state matters on affiant's belief.¹ When it is apparent from the affidavit itself that the statements therein are not within the personal knowledge of the witness, or where it appears from the very nature of things that the statements made by him are not within his knowledge, such statements are of no value whatever.²

§ 246. **Voluminous books — Tabulated statements.**— In all cases of accounting before a master involving the examination of voluminous books, papers and other sources of information, parties should aid him in arriving at correct conclusions, by having experts or other competent witnesses to examine the same and give summaries thereof. When the entries are numerous and complicated there is no question as to the power of the court to permit an expert book-keeper, who has examined the same, to give a summary oral statement of their contents and computation.³ It is no valid objection to such evidence that the witness uses, while giving his evidence, an abstract of the books made by himself after his examination of the originals.⁴ Not only may such oral summaries or statements be received, but when a competent witness has examined books and made an abstract of them, and an opportunity has been given for cross-examination as to such abstract, there is no reason why it may not be read in evidence.⁵ Therefore it is a rule laid down in the text-books and sustained by the authorities that where the evidence is the result of voluminous facts, or of the inspection of voluminous books and papers, the examination of which cannot take place in court, general results may be shown in the form of summaries, schedules or tabulated state-

¹Thompson v. Higginbotham, 18 Kan. 42; City of Atchison v. Bartholow, 4 Kan. 124.

²Ferris v. Commercial Nat. Bank, 158 Ill. 237, 241, 41 N. E. 1118; Bornstein v. Harding, 16 N. Y. Supp. 91. As to value of testimony by affidavit, see Johnston v. Todd, 5 Beav. 597.

³Culver v. Marks, 122 Ind. 554, 566, 23 N. E. 1086, 7 L. R. A. 489, 17 Am. St. 377; Chi., St. L. etc. R. R. Co. v. Wolcott, 141 Ind. 267, 278, 39 N. E. 451; Hollingsworth v. State, 111 Ind.

289, 297, 12 N. E. 490; Eq. Accident Ins. Co. v. Stout, 185 Ind. 444, 33 N. E. 623; Meyer v. Sefton, 2 Stark. 274; Woodruff v. State, 61 Ark. 157, 170, 32 S. W. 102; Jordan v. Osgood, 109 Mass. 457, 464, 12 Am. R. 731; State v. Findley, 101 Mo. 217, 223, 14 S. W. 185.

⁴Chi., St. L. etc. R. R. Co. v. Wolcott, 141 Ind. 267, 278, 39 N. E. 451.

⁵Culver v. Marks, 122 Ind. 554, 566, 23 N. E. 1086, 7 L. R. A. 489, 17 Am. St. 377.

ments made by experts after a careful examination of the originals.¹ Indeed some courts have gone so far as to hold that parties are not allowed to put their general books of account in evidence.² Neither the court nor the master can be expected to examine such books in detail, consisting, as they often do, of numerous immense folios.³ And it is not a ground of exception to a master's report, that he admitted as evidence summary statements prepared from the books by a person who made them up, as agent of both parties.⁴

§ 247. Voluminous books — Tabulated statements — Continued.— Such evidence is admitted for convenience, and therefore it is said that whether a party will be permitted to introduce in evidence summaries or tabulated statements made by experts or other competent witnesses, of voluminous facts, books and other sources of information already in evidence, rests in the discretion of the master.⁵ Such tabulated statements, or schedules, are not only of great convenience to the master and the court, but are in many cases almost a necessity,⁶ and frequently the only practicable method of conducting the examination.⁷ Especially is this true where it is sought to

¹ 1 Greenl. Ev., § 931 (§ 563*h* of the 16th ed.); *Bradner on Ev.*, pp. 242, 243; 1 *Rice on Ev.*, p. 237; 1 *Taylor's Ev.*, § 462; *Bicknell v. Mellett*, 160 Mass. 328, 35 N. E. 1130; *Boston & Worcester R. R. Corporation v. Dana*, 1 Gray (Mass.), 83, 104; *Burton v. Driggs*, 20 Wall. (U. S.) 125, 136; *State v. Brady*, 100 Iowa, 191, 198, 69 N. W. 290, 36 L. R. A. 693, 62 Am. St. 560; *West Pub. Co. v. Lawyers' Co-op. Pub. Co.*, 25 C. C. A. 648, 79 Fed. 756, 35 L. R. A. 400; *Rollins v. Board of Commissioners*, 90 Fed. 575, 583; *Northern Pac. Ry. Co. v. Keyes*, 91 Fed. 47, 58; *Eq. Accident Ins. Co. v. Stout*, 135 Ind. 444, 454, 33 N. E. 623; *San Pedro Lumber Co. v. Reynolds*, 121 Cal. 74, 53 Pac. 410, 413; *Bartley v. State*, 53 Neb. 810, 73 N. W. 744, 754; *Masonic Mut. Benefit Society v. Lackland*, 97 Mo. 137, 10 S. W. 895, 10 Am. St. 298.

² *Reed v. Jones*, 8 Wis. 421; *Turner v. Hughes*, 1 Busbee Eq. (N. C.) 116.

³ *Norwood v. Norwood*, 2 Bland, 471; *Budeke v. Ratterman*, 2 Tenn. Ch. 459.

⁴ See *Daniell*, Ch. Pr. 1222, note.

⁵ *Jordan v. Osgood*, 109 Mass. 457, 464, 12 Am. R. 731; *Van Sachs v. Kretz*, 72 N. Y. 548, 552; *Bicknell v. Mellett*, 160 Mass. 328, 35 N. E. 1130; *Boston & Worcester R. R. Corporation v. Dana*, 1 Gray (Mass.), 83, 104; *Bradner on Ev.*, p. 242.

⁶ *West Pub. Co. v. Lawyers' Co-operative Pub. Co.*, 25 C. C. A., 648, 79 Fed. 756, 758, 35 L. R. A. 400; *Northern Pac. Ry. Co. v. Keyes*, 91 Fed. 47, 58; *Rollins v. Board of Commissioners*, 33 C. C. A. 181, 90 Fed. 575, 583.

⁷ *Northern Pac. Ry. Co. v. Keyes*, 91 Fed. 47, 59; *San Pedro Lumber Co. v. Reynolds*, 121 Cal. 75, 53 Pac. 410, 413. In this last case it was shown that the books from which the tabulated statements were made "would weigh a ton."

show a negative, that is, what the books do not contain.¹ In cases frequently involving the examination of thousands of separate items, this method of procedure becomes almost a necessity to enable the master to arrive at anything like an intelligent conclusion, without the expenditure of a vast amount of time and labor upon his part. In such cases, after the books, papers and other items of original evidence have been offered and received, the testimony of some competent person, who has prepared a tabulated statement in writing, summarizing the numerous items offered in evidence, should be received.² The original sources of information being in evidence, the correctness of tabulated statements can be readily verified by comparison, and by examination of the witness who made them, and being thus verified they become of great assistance to the master in making his findings,³ as well as to the chancellor when called upon to review the master's work upon exceptions to his report. Such schedules or tabulated statements should only be admitted where books and documents are multifarious and voluminous, and of a character to render it difficult to comprehend material facts without their aid, and, even in such cases, they should not be admitted unless verified by the witness who prepared them, who testifies as to their accuracy, and not until ample time has been given to the adverse party to examine them and test their correctness.⁴

To be admissible in evidence it is not necessary that such abstracts or tabulated statements should be made by experts. They may be made by any competent witness. It must be remembered, however, that there is a distinction between a mere summary, abstract, or tabulated statement showing facts gathered from voluminous entries or other sources of information, and statements showing the conclusions or opinions of the witness based upon the facts proven. In the former case any competent witness who made the abstract or tabulated statement may be called to verify it,⁵ while in the latter case the

¹San Pedro Lumber Co. v. Reynolds, *supra*; Burton v. Driggs, 20 Wall. (U. S.) 125, 136.

²Rollins v. Board of Commissioners, 80 C. C. A. 181, 90 Fed. 575, 583.

³Rollins v. Board of Commissioners, 38 C. C. A. 181, 90 Fed. 575, 583.

⁴Id.; Bradner on Ev., pp. 242, 243.

⁵In the case of Boston v. Worcester R. R. Corporation, 1 Gray, 83, 89,

ess to be competent must be first shown to be an expert untant.¹ In permitting statements of this kind to be offered, onnection with the testimony of the witness who made a, care must be taken to confine the same to matters in- ed in the primary evidence properly introduced, for this od of summarizing, for convenience sake, numerous items, ng dates and amounts, should not be made the means of ing in evidence conclusions drawn by the witness from ces of information not admitted in evidence.²

248. Voluminous books — Tabulated statements — Com- ed.— These summaries or tabulated statements should e constant reference to the originals, by book and page, therwise, and the originals themselves must be at hand, or uced if called for, where the opponent can consult them o chooses.³ In some instances it appears that the books o in the court room ready for inspection,⁴ while in others, re the books and documents were too bulky to be produced ourt without great inconvenience, it was deemed sufficient the fullest opportunity for inspection was given to the op- te party.⁵ By placing the originals, from which such tabu- l statements are compiled, freely at the disposal of the erse party, a reasonable safeguard is provided against falsi- ion in the preparation of such statements. It is the duty e party furnishing such statements to render to the oppo- party the fullest assistance in explanation of the same, and master should allow the same to be placed in the hands of rt accountants, if desired by such adverse party, for the

he schedules were made by a et-selling clerk" in the employ e plaintiff, and in Northern Ry. Co. v. Keyes, 91 Fed. 47, 58, ables admitted in evidence were red by forty or fifty clerks in mploy of the company, and afterward verified by heads of epartments, who were called as sses, and this method of pre- g the figures from which the s were compiled was fully ex- ed and their trustworthiness n.

1. Accident Ins. Co. v. Stout, 185

Ind. 444, 454, and cases cited; San Pedro Lumber Co. v. Reynolds, 121 Cal. 75, 58 Pac. 410, 413; Bartley v. State, 53 Neb. 810, 73 N. W. 744, 757; Masonic Mut. Benefit Society v. Lackland, 97 Mo. 137, 10 S. W. 895, 10 Am. St. 298.

² Rollins v. Board of Commission- ers, 33 C. C. A. 181, 90 Fed. 575, 588.

³ 1 Greenl. Ev. (16th ed.), § 563h.

⁴ Bartley v. State, 53 Neb. 810, 73 N. W. 744, 757-778.

⁵ Bartley v. State, *supra*; San Pedro Lumber Co. v. Reynolds, *supra*.

purpose of detecting error or falsification.¹ If a party desires to preserve the question as to the competency of such tabulated statements, he must do so by a specific objection. A general objection is insufficient.² It does not follow that because books are admissible in evidence, upon the hearing of a cause, that a party can throw down such books, consisting often of immense folios, and ask the court to grope through them.³ Nor can a master, upon a reference, be required to examine the books in detail.⁴ The proper mode of using them is to have them examined by experts, to ascertain balances, and to extract from them, in the form of exhibits or schedules, such items or facts as may be in dispute, or tend to elucidate contested matters. To make the books themselves exhibits is an idle form, except to identify them. They are in evidence before they are exhibits. If the witnesses who are examined as to the contents of the books agree in their statements, it is unnecessary to look beyond their evidence. If the witness undertakes to misstate their contents, he may be contradicted by other witnesses, or by the books themselves. Any other course would tend to confusion, uselessly incumber the record, and do no good.⁵

The importance of the practice of requiring the parties to furnish the master with tabulated statements of matters shown by the books offered in evidence is illustrated by a North Carolina case. The supreme court of that state says: "The practice is founded in reason; and no case exemplifying its correctness more fully could present itself than the one we are now considering. The business of the firm was the sale of books, stationery and fancy articles. The copartnership has existed fifteen years; and the report states that the accounts the master was required to state ran through thirty-five folio volumes, and that it would have taken him six to nine months, as he was informed and believes, to have performed the duty. Now when it is recollected that as a clerk and master he cannot be

¹ *Northern Pac. Ry. Co. v. Keyes*, 91 Fed. 47, 59.

² *Masonic Mut. Benefit Society v. Lackland*, 97 Mo. 137, 10 S. W. 895, 10 Am. St. 298.

³ *Norwood v. Norwood*, 2 Bland (Md.), 471, 481, note; *Budeke v. Ratterman*, 2 Tenn. Ch. 459, 463.

⁴ *Turner v. Hughes*, 1 Bush. Eq. 116; *Budeke v. Ratterman*, 2 Tenn. Ch. 459, 463.

⁵ *Budeke v. Ratterman*, 2 Tenn. Ch. 459, 463; *Groenendyke v. Coffeen*, 109 Ill. 325.

allowed by the court more than \$50 for taking an account, it is manifestly unjust to require the master to wade through books requiring such labor. Besides, it would require too much time of the master. The practice works no hardship to the parties. If they mutually desire a decision of the controversy, they can employ a commissioner, who, for a proper consideration, can perform the work. If they do not so choose, but for some purpose prefer going before the master, they must be prepared to exhibit their accounts; not as scattered through many books, but brought together in one account, as either claims, each furnishing his own account, and presenting the state of the books, as each may contend the entries did or ought to appear. By pursuing this course, more complete justice can be done, the cause expedited and much delay avoided."¹

§ 249. Examination of witnesses—Leading questions.—The general rule is that, in the direct examination of witnesses, it is not permissible to put leading questions to them.² But to this general rule there are many exceptions, among which may be noted the following: Where the witness is "unwilling or evasive," it is in the discretion of the court to permit counsel to put leading questions;³ where the witness is reluctant and hostile to the interests of a party calling him;⁴ where the party has exhausted the memory of his witness without stating the particular required;⁵ where the object sought by the question is to ascertain the proper name of the party, or other fact which cannot be significantly pointed out by a general interrogatory;⁶ where the witness is a child of tender years, whose attention can be called to the matter required only by a pointed or leading question;⁷ where the witness appears to be hostile to the party calling him, or in the interest of the other party, or is an unwilling witness, or his omission is clearly a want of recollection, as to a date or a name, leading questions are allowed. So where the transaction involves numerous items or dates.⁸ Leading questions are frequently

¹ *Turner v. Hughes*, Busb. Eq. R. 116.

⁵ *Moody v. Rowell*, 17 Pick. 490, 498,

² *Crean v. Hourigan*, 158 Ill. 301, 303,

28 Am. Dec. 317.

41 N. E. 880; *Greenl. on Ev.*, § 434.

⁶ *Moody v. Rowell*, 17 Pick. 490,

³ *Cassem v. Galvin*, 158 Ill. 30, 35,

498, 28 Am. Dec. 317.

41 N. E. 1087.

⁷ *Moody v. Rowell*, 17 Pick. 490,

⁴ *Moody v. Rowell*, 17 Pick. 490,

498, 28 Am. Dec. 317.

498, 28 Am. Dec. 317.

⁸ 1 *Greenl. on Ev.*, § 435.

permissible, and the proper course to be pursued is to leave the propriety of such questions largely to the discretion of the trial judge.¹ Another exception to the rule is, where the witness surprises the party calling him, by making a different statement from that made on the examination preparatory to trial. In such a case, when the party has been deceived in the conduct of his witness, he may interrogate him as to the previous statements, for the purpose of refreshing his recollection, if he is a forgetful witness, or for the purpose of probing his conscience, and move him to relent and speak the truth, if he be a perverse one. Such a course is necessary as a security against the contrivance of an artful witness, who otherwise might recommend himself to a party by promise of favorable evidence, and afterwards by hostile evidence ruin his cause.²

§ 250. Examination of witnesses — Leading questions — Continued.— Such questions may be asked of the witness for the purpose of probing his recollection, calling to his mind the statements he previously made, and in drawing out an explanation of his apparent inconsistency. This course of examination may result in satisfying the witness that he has fallen into error, and that his original statements were correct, and are calculated to elicit the truth. Such a course is proper also for the purpose of showing the circumstances which induced the party to call him.³ Whether a party who has thus interrogated his own witness, who has surprised him by adverse testimony, can be allowed to call witnesses to prove such contradictory statements, is a question upon which the authorities differ.⁴ The rule that a party cannot impeach his own witness has no application to the calling of other witnesses, though they may contradict the testimony of the first, and to that extent impeach his statements.⁵

¹ Funk v. Babbitt, 55 Ill. App. 124, 127; 1 Greenl. Ev., § 435; 1 Thompson on Trials, §§ 359, 360.

² National Syrup Co. v. Carlson, 42 Ill. App. 178, 185, 186.

³ For other cases upon this subject see People v. Safford, 5 Denio, 112; Thompson v. Blanchard, 4 Comst. 803, 811; Sanchez v. People, 22 N. Y. 147; Melhuish v. Collier, 15 Adol. & Ell. (N. S.) 878; State v. Lull, 37 Me. 246;

Cronan v. Cotting, 99 Mass. 334; Greenl. Ev., § 444; Best on Ev. 645; 1 Thompson on Trials, § 512; and see Hurley v. The State, 46 Ohio St. 320, 4 L. R. A. 161, and note, where these questions are fully discussed.

⁴ Bullard v. Pearsall, 53 N. Y. 230, 232; National Syrup Co. v. Carlson, 42 Ill. App. 178, 186.

⁵ Franklin Bank v. Pa. D. & M. Steam Nav. Co., 11 Gill & J. 28, 88

Particular circumstances frequently warrant a departure from the general rule as to leading questions, and the proper course to be pursued in each instance must, and does, largely rest in the sound discretion of the trial judge, who has opportunities for intelligent and correct judgment so far superior to that of an appellate court that his action is subject to review only in case of manifest abuse of the discretion with which he is vested.¹ This discretionary power to vary the general rule is to be exercised only so far as the purposes of justice plainly require, and is to be regulated by the circumstances of each case.² So, a judge may, in his discretion, prohibit certain leading questions being put to an adversary's witness, where the witness shows a strong interest or bias in favor of the cross-examining party, and needs only an intimation, to say whatever is most favorable to that party.³

§ 251. **Cross-examination of witnesses.**—The rule has long been settled that the cross-examination of a witness must be limited to the matters stated in his direct examination. If the adverse party desires to examine him as to other matters, he must do so by calling the witness to the stand in the subsequent progress of the case.⁴ It is certainly well settled that an examination must be confined to the matters which have been stated in the examination in chief. The party will not be permitted to lead out new matter, constituting his own case, by the cross-examination of his adversary's witnesses.⁵ A nice question is frequently presented to the master as to how far to

Am. Dec. 687; *Com. v. Starkweather*, 10 Cush. 59; *Brolley v. Lapham*, 13 Gray, 294; *Champ v. Com.*, 2 Met. (Ky.) 17, 74 Am. Dec. 338; *Coulter v. Am. M. U. Exp. Co.*, 56 N. Y. 585; *Spencer v. White*, 1 Ired. L. 236; *Lawrence v. Barker*, 5 Wend. 301, 302; *Mitchell v. Sawyer*, 115 Ill. 650, 5 N. E. 109; *Hurley v. State*, 46 Ohio St. 320, 4 L. R. A. 161, and cases cited in note.

¹ *Funk v. Babbitt*, 55 Ill. App. 124, 127, 128; 1 Greenl. on Ev., § 435; 1 *Thompson on Trials*, § 360; *York v. Pease*, 2 Gray, 282, 284.

² *Moody v. Rowell*, 17 Pick. 490, 498, 28 Am. Dec. 317.

³ *Moody v. Rowell*, 17 Pick. 490, 498, 28 Am. Dec. 317.

⁴ *Seymour v. Malcolm M'Donald Lumber Co.*, 7 C. C. A. 593, 58 Fed. 957, 960; *Houghton v. Jones*, 1 Wall. 702, 706; *Hanchett v. Kimbark*, 118 Ill. 121, 128, 7 N. E. 491; 1 Greenl. Ev., secs. 445, 447; 1 Whart. Ev., sec. 529.

⁵ *Jackson v. Litch*, 62 Pa. St. 451, 455; *Ellmaker v. Buckley*, 16 S. & R. 72; *Floyd v. Bovard*, 6 W. & S. 75; *Mitchell v. Welch*, 5 Harris, 339, 55 Am. Dec. 557; *Turner v. Reynolds*, 11 Harris, 199.

limit the cross-examination of a witness. The rule is well settled that cross-examination must be confined to the matters brought out in the examination in chief, and that a party will not be permitted, under the pretense of cross-examination, to draw out of his adversary's witness new matter in support of his own side of the case.¹ Yet this is not literally true in practice, and the whole matter rests largely in the sound discretion of the master or trial judge.² Authorities of the highest character show that the established rule of practice in the federal courts, and most other jurisdictions in this country, is that a party has no right to cross-examine a witness, without leave of court, as to any facts and circumstances not stated in direct examination.³ This is a broad principle, well established, although sometimes lost sight of in loose practice at trials.⁴

The rule, however, is not so strictly enforced as to prevent a cross-examination upon collateral matters calculated to throw light upon the facts stated in chief; for example, a cross-examination is not limited to the very day and exact fact named in the direct examination. It may extend to other matters which limit, qualify, or explain the facts stated on the direct examination, or modify the inference deducible therefrom, providing only that such matters are directly connected with the facts testified to in chief.⁵ Where a witness states a fact in chief in his examination, upon cross-examination he may be asked by the other party to detail all the circumstances within his knowledge which qualify it, even though they may constitute new matter and form a part of his own case.⁶ A party is entitled to bring out every circumstance relating to a fact which an adverse witness is called to prove.⁷ Again, a cross-

¹ Jackson v. Litch, 62 Pa. St. 451, 455; Ellmaker v. Buckley, 16 S. & R. 72; Floyd v. Bovard, 6 W. & S. 75; Mitchell v. Welch, 5 Harris, 339, 55 Am. Dec. 557; Turner v. Reynolds, 11 Harris, 199.

² Jackson v. Litch, 62 Pa. St. 451, 455; Schnable v. Doughty, 3 Barr, 392; Helser v. McGrath, 2 P. F. Smith, 531, 533.

³ Wills v. Russell, 100 U. S. 621, 625.

⁴ Philadelphia & Trenton R. Co. v. Stimpson, 14 Pet. 448, 461.

⁵ Blake v. Powell, 26 Kan. 320, 326.

⁶ Jackson v. Litch, 62 Pa. St. 451, 456; Perit v. Cohen, 4 Whart. 81; Markley v. Swartzlander, 8 W. & S. 172.

⁷ Jackson v. Litch, 62 Pa. St. 451, 456; Bank v. Fordyce, 9 Barr, 275, 49 Am. Dec. 561.

examination may extend to any matters which show bias or prejudice upon the part of a witness, and to all matters which properly affect his credibility, subject to these exceptions; the general rule is as stated above.¹ The witness having voluntarily and without objection testified to part of a transaction, in such a manner as favorably to affect the case of one side, cannot afterwards object to giving the remainder of the story, when such remainder might afford an explanation of an answer to the part already given. And this is true even though telling the remainder will tend to convict the witness of a crime.²

§ 252. Cross-examination of witnesses — Continued.—The object of a cross-examination is to elicit the whole truth concerning transactions which may be supposed to have been only partially explained, and where the whole truth would present them in a different light. Whenever a part of an entire transaction is omitted or concealed, or is defectively stated, any question which fills up the omission, whether designed or accidental, is legitimate and proper on cross-examination. A party cannot glean out certain parts which alone would make out a false account, and save his own witness from the sifting process, by which only those omissions can be detected. There could be no such thing as cross-examination if such a course were allowed. No one could expose a fraudulent witness for his dishonest concealment; and every one who knew of such practice would be driven to the necessity of calling, in his own behalf, an adverse witness to show his own concealments, whom, if perjured, he could not impeach.³

The privilege of declining to testify to a transaction because it will criminate or tend to criminate the witness is one that must be exercised at the proper time, otherwise it will be considered as waived by the witness. If he submits to testify about the very matter tending to criminate himself, without claiming his privilege, he must submit to a full cross-examination. If he begins at all, knowing his right to decline to

¹ *Wills v. Russell*, 100 U. S. 621, 625. *Crittenden v. Strother*, 2 *Cranch*,

² *Rea v. Missouri*, 17 Wall. 532, 539; *C. C. 464, Fed. Cas. 3,394*.

Roberts v. Garen, 1 *Scam.* 396, 397; ³ *Chandler v. Allison*, 10 *Mich.* 460, *Pitcher v. People*, 16 *Mich.* 142, 149; 477, 478.

answer, he is bound to make a full disclosure.¹ He cannot be allowed to state such facts only as he pleases to state, and to withhold other facts.² But he does not thereby waive his privilege of refusing to reveal other unlawful acts, wholly unconnected with the act of which he has spoken, even though they may be material to the issue. His consent to speak of one criminal act cannot deprive him of that protection which the law affords him so far as relates to other criminal acts not connected with it.³ In a cross-examination where the object is to test the truthfulness, judgment and credibility of the witness, great latitude is extended to a party where the object is to test the memory, the purity of principle, the skill, accuracy and judgment of the witness. The consistency of his answers with each other, and with his present testimony, his life and habits, his feelings towards the parties respectively, are all matters which, when properly brought out by cross-examination, enable the judge, jury or master to determine the degree of confidence they may safely place in the testimony of a witness.⁴

§ 253. Cross-examination of witnesses — Continued.— More latitude is always allowed in cross-examination, where the witness is one of the parties in interest, than in the case of an ordinary witness, and the court or master may, in his discretion, where the party in interest is a witness, allow the cross-examination to take a wider range; and it will not be held error unless it appears that there has been an abuse of the exercise of sound legal discretion.⁵ Yet in all cases the cross-examination of a witness should be kept within fair and reasonable limits.⁶ The court may always limit a cross-examination when justice requires it.⁷ We have already seen that,

¹ Chamberlain v. Willson, 12 Vt. 491, 493, 36 Am. Dec. 356.

² Com. v. Price, 10 Gray, 472, 476, 71 Am. Dec. 668; Coburn v. Odell, 10 Foster (N. H.), 540, 555.

³ Low v. Mitchell, 18 Me. 372, 374.

⁴ Hathaway v. Crocker, 7 Met. 262, 266.

⁵ Hanchett v. Kimbark, 118 Ill. 121, 129, 7 N. E. 491; Rea v. Missouri, 17 Wall. 532, 542.

⁶ Davison v. People, 90 Ill. 221, 228; Birmingham Fire Ins. Co. v. Pulver, 27 Ill. App. 17, 20.

⁷ Birmingham F. Ins. Co. v. Pulver, 27 Ill. App. 17, 20; s. c., 120 Ill. 329, 340; First Nat. Bank v. Dunbar, 118 Ill. 625, 629, 9 N. E. 186; Chicago City Ry. Co. v. Van Vleck, 143 Ill. 480, 486, 32 N. E. 262.

under some issues — for example, where fraud is charged, — the courts permit a very liberal course to be pursued in the examination of witnesses.¹ Yet, while it is true that in the investigation of charges of fraud the court will incline to give in great freedom in the introduction of evidence, and latitude in cross-examination, the rule should be applied to the parties and such witnesses as are involved in the fraudulent transaction, and even as to the trial judge or master should carefully guard against such a liberal privilege as will work injustice by defeating the object of the inquiry — the elicitation of truth.

If a party is indulged in putting leading questions in irregular cross-examination, it gives him an unfair advantage, unless the other party has the same liberty with respect to the evidence elicited is new. At best this is disorderly, and it is prejudicial to a full comprehension of the contest before the trial judge or master.²

The extent of a cross-examination is a matter to be left in the sound discretion of the trial judge, or the trial judge or master in this regard should be reversed, unless it clearly appears that there is an abuse of such discretion resulting in injury to the complainant. How far justice, depending upon the discovery of the truth, requires a cross-examination should be allowed to the extent of fact to be determined at the trial, in view of the character of the witness and all the circumstances of the case. The rules, as well as all others pertaining to the examination of witnesses and the introduction of testimony, should be applied to their object the elicitation of truth and the maintenance of the equality of the rights of parties in trials in the exercise of a prudent discretion on the part of the trial judge is the only guard against preventing an iron

¹ *Ante*, §§ 236-238.

² *Helser v. McGrath*, 52 Pa. St. 531, 533.

³ *Rea v. Missouri*, 17 Wall. 532, 542; *Wills v. Russell*, 100 U. S. 621, 626; *Miller v. Smith*, 112 Mass. 470, 476; 1 Black (U. S.), 209, 216; *Commonwealth v. Lyden*, 113 Mass. 452.

⁴ *Gutterson v. Morse*, 58 N. H. 165,

and cases cited:

bark, 118 Ill. 12

Luthy v. Kline, 5

Wallace v. Taun

Mass 91, 93; *Com*

4 Cush. 593, 594,

Birmingham Fir

27 Ill. App. 17, 20

resulting in injustice in many instances.¹ Again, as above stated, the rule is not literally applied in practice. Where counsel has obtained from his own witness a statement of fact, he may be required, on cross-examination, to detail all the circumstances within his knowledge which qualify it, even though they constitute new matter and form a part of his own case. This the authorities clearly establish.²

§ 254. Cross-examination of witnesses—Continued.—

While it is true that the extent of cross-examination is a matter resting in the discretion of the master, and that, under certain circumstances, a very liberal course should be permitted, depending upon the nature of the issues and the conduct and manner of the witness upon the stand, yet the master should be careful never to require a witness to answer questions relating to immaterial and irrelevant matters, the object of which can only be to humiliate and degrade him. The object of a trial is to ascertain the truth relating to matters which are at issue in order that the court may administer justice between the parties. The testimony is for the purpose of enabling the court to determine the truth, that the ultimate object of a trial may be attained. For this reason the witness, even if he be a party to the suit, cannot be "compelled to divulge the secrets of his life, unless such secrets are connected with or have some bearing upon the matters being tried." Thus, in a case where the issue was whether the defendant was liable to the plaintiff under contract for wages, the trial court compelled the defendant, against his objection, to answer questions as to his relations with certain women, as to how long he had known them; how frequently he visited them; whether or not he kept some of his clothes where one of them lived, and whether he did not pay the living expenses of one of them. The upper court reversed the action of the lower court upon this ground, remarking that, "A party, when he becomes a witness, even on cross-examination, is entitled to be protected. Witnesses have some rights which courts are bound to respect and protect. Attacks of the character set

¹Sharswood, J., in *Jackson v. Litch*, Whart. 81; *Markley v. Swartzlander*, 68 Pa. St. 451, 455. 8 W. & S. 172; *Bank v. Fordyce*, 9

²*Id.* See also *Perit v. Cohen*, 4 Barr, 275, 49 Am. Dec. 561.

cannot be made on one's private life and examination."¹

indeed, as has already been said, is allowed to cross-examine a witness, yet he is entitled to protection from unnecessary insult and abuse; hence counsel is not allowed to put questions, irrelevant to the issue, which tend to bully and degrade.² This right to protect a witness is founded upon the character or standing of the witness. A witness called as a witness, whether high or low, of good or ill-repute, of an orderly or dissolute character, on the witness stand, an absolute right to be treated with respect. The witness is there, not simply of his own volition, but under the command of the law, and counsel has no right to treat him otherwise than as the highest gentleman in the land.³ When the cross-examination of a witness is insulting and degrading, it involves itself into a contest of skill or nerve between the witness and the lawyer," it should be promptly stopped, waiting for an objection.⁴

Examination of witnesses — Continued.— The reputation of the witness for truth and veracity may properly be inquired into for the purpose of impeaching his testimony. It is therefore not proper to inquire into the traits of character, aside from that which tends to impeach the purpose of impeachment. Thus, a witness may be impeached by evidence that he is in the habit of associating with lewd and unchaste women; neither is it proper, to impeach a female by attacking her chastity, even where it is proposed to prove her to be a prostitute.⁵ In a Texas case, the defense

¹ 38 Chi. Leg. 392, 393; *Com. v. Churchill*, 11 Me. 158.
² *Ry. Co. v. 7 Vt. 141; Spears v. Forrest*, 16 Vt. 159; *Smith v. 485, 487; Gilchrist v. M'Kee*, 4 Wat. 108, 112.
³ *Co. v. Barron*, 66 Me. 116; *Rudsill v. Slingerland*, 18 Minn. 380; *Atwood v. Impeon*, N. J. Eq. 150, 157; *Bucklin v. State*, 20 Ohio, 18, 22-25; *Muetze v. Tuttle*, 77 Wis. 236, 243, 46 N. W. 128, L. R. A. 86, 29 Am. St. Rep. 1.
⁴ (R. I.), 49 Atl. Moore v. Moore, 78 Texas, 382, 81

ant being on the stand testifying in his own behalf, the plaintiff proposed to prove by him that he "voluntarily took what is commonly known as the ironclad oath, whereby he qualified himself to hold and did hold office under the federal government after the late war, and further, that such oath was inconsistent with existing facts, in this, that he thus swore that he never aided or assisted the so-called rebellion, when in truth he had at one time volunteered to go into the Confederate service, and that as a minister of the gospel, during the war, he had prayed for the success of the Confederacy, then in hostility to the United States government, and that among other things he prayed that 'the enemy (meaning the federals) should be made fools in council and cowards in battle.'" It was held that this testimony was properly excluded by the trial court.¹ So, too, in Illinois the trial court committed a similar error. The defendant being on the stand testifying, giving evidence "in his own behalf, was compelled, over his counsel's objection, to state that he had visited houses of ill-fame in Cleveland and Chicago, a number of times, and of having had connection with their inmates; and also that he had played cards for money."²

While particular traits of misconduct are thus excluded as subjects of inquiry, the master should permit full cross-examination to throw light upon the issues involved, or to enable the master and the court to properly weigh the testimony of the witness. For example, if the witness is biased or prejudiced against a party, or in favor of the party calling him, such fact may be made to appear by cross-examination. If he has previously made statements contrary to those made upon the witness stand this fact may be brought out in the same way. His relation to the case, if any; his interest in the result; his relationship to the parties or either of them; how he came to be a witness; his intelligence; means of knowledge; his busi-

Bakeman v. Rose, 18 Wend. 146; 1 Greenl. Ev. (16th ed.), § 461a; 1 Jackson v. Lewis, 13 Johns. 504; Frye Whart. Ev., § 562.
 v. Bank of Illinois, 11 Ill. 367, 378; ¹ Moore v. Moore, 78 Texas, 382, 388.
 Dimick v. Downs, 82 Ill. 570, 573; ² Gifford v. People, 87 Ill. 210, 214;
 Gifford v. People, 87 Ill. 210, 214, Aiken v. People, 183 Ill. 215, 220, 221,
 148 Ill. 173, 176; Aiken v. People, 183 Ill. 215, 220, 221, 55 N. E. 695.
 Ill. 215, 220, 221, 55 N. E. 695;

is; place of residence; the accuracy of his memory, and any other things—which need not be enumerated—may be brought out, for the purpose of enabling the jury to place a value upon his statements. But that the reputation of a witness may be ransacked, and his misconduct produced for the purpose of disgracing him and degrading his testimony, cannot be permitted. If unrestricted liberty were allowed in this respect, no witness, however modest or however venerable, could be sworn without being required, if it should please the opposing counsel, to submit to an investigation into his or her private history, however offensive and humiliating this might be. And notwithstanding the acts of misconduct which might thus be brought out were long ago atoned for and generally forgotten.¹

A party who objects to evidence considered by him as incompetent, when admitted by the master, should, nevertheless, cross-examine. As the “objecting party cannot know in advance what the decision of the court may be, a failure to cross-examine before the master may deprive him of the opportunity to do so if his objection is overruled.”²

§ 256. Impeachment of witnesses.—A party may impeach the testimony of a witness in a cause in various ways, such as:

First. By disproving the matters stated by him, by other witnesses.

Second. By proof that he has made statements out of court contrary to what he has testified to.

Third. By general evidence affecting his reputation for truth and veracity.

Fourth. By proof that a witness is friendly to the party calling him, or hostile to the other party.

Fifth. By showing that the witness is interested in the matter in controversy.

Sixth. By proof that the witness has been guilty of an infamous crime.

Seventh. By bringing out, on cross-examination, the history, character and antecedents of the witness.

Kolb v. Union R. Co. (R. I.), 49 Atl. 394.

² Achilles et al. v. Achilles, 137 589, 595, 26 N. E. 45.

Eighth. The testimony of a witness may be impeached by the inherent improbability of his statements.

To impeach, in the sense in which it is used above, signifies to disparage, to depreciate, or to discredit. Most of these methods of impeachment are applicable only to witnesses of the opposite party, as will be seen below. These will be examined in their order, and:

First. By disproving the matters stated by calling other witnesses.

This method of attack or disparagement of the testimony of a witness is equally open to both parties, as to all the witnesses produced by either. Though it indirectly permits a party to impeach his own witness, yet there is no question but that he may do so.

Second. A party may attack the testimony of a witness of his opponent by proof that such witness has made contradictory statements; that is, that he has, out of court, made statements inconsistent with his version of the matter as given upon the witness stand; but before such evidence is admissible, the witness whose testimony is attacked must be asked as to the time, place and persons involved in this enforced contradiction, because, upon the general question, he may not remember whether he has said so or not, and justice requires that his attention be first called to the subject. He may then deny such a statement, admit it or correct and explain.¹

If a witness is asked, with a view of impeaching his testimony, if he did not at a given place on a certain date state so and so, and if he neither admits nor denies that he did, but answers evasively, such as "I would not be surprised," "I don't know," or, "Don't recollect," witnesses may be called to contradict him and show just what he did say.²

Third. A party is always permitted to attack a witness produced by his opponent, by proof that the general reputation of such witness for truth and veracity is bad.

General reputation consists of what is generally said of a person with respect to the particular trait of character in ques-

¹ *Becker v. Koch*, 104 N. Y. 394, 401, 58 Am. R. 515; *Conrad v. Griffey*, 16 How. 46, 47. See authorities cited in opinions in both these cases. ² *Ray v. Bell*, 24 Ill. 444, 451; *Wood v. Shaw*, 48 Ill. 278, 276; *Bressler v. People*, 117 Ill. 422, 434, 8 N. E. 62.

ecessary that the witness should have heard a number of the neighbors discuss that character. It will be that the reputation for truth and honesty, or common honesty of a person may be known by neighbors and acquaintances without having been discussed. Indeed, one whose word passes current among friends and neighbors, or who is received and accepted as a virtuous man or woman, or whose honor is established in the community in which he lives, without discussion or comment, and yet every person in the community knows that he or she is accepted, recognized, and known to be a truthful, virtuous or honest person.

Examination of witnesses — Continued.— Before a witness is permitted to state what the general reputation of a person thought to be impeached is, for truth and veracity, he must state that he knows such general reputation. If he has heard something against him, mostly in reference to other matters besides truth and veracity, such remarks, who refer to particular transactions, are inadmissible. It is not the evidence which the law permits, and it does not affect the credibility of a witness. With many men there is a habit and principle which they adhere to, and they may indulge in drinking, swearing, gambling, and making close bargains. With others, lying is a habit, and if elevated to be senators or legislators, or church members or deacons, it does not always affect their character. The object of the law is to show the character of a witness, and in telling the truth; general reputation in the community is known, in this regard, is the test and the standard which the law allows as to character. If he is a common liar, he is not believed when under oath.¹ It cannot, therefore, be shown whether the witness has the general reputation of a thief, prostitute, murderer, forger, adulterer, or the like; although each and every one of these crimes, to a greater or less degree, impairs the moral character, and tends to impeach his or her veracity.

¹ 48 Ill. 173, 177. ² *Atwood v. Impeon*, 20 N. J. 150, 157.

³ 5 Pa. St. 51; ⁴ *Bakeman v. Rose*, 18 Wend. 101.
⁵ 23 Ala. 28, 10 So. 58 Ga. 318.

In the impeachment of a witness the same rule of evidence applies in equity as in law, and the inquiry ought to be general, as to the general character of the witness for veracity, but it seems that on special application the inquiry may be allowed to go beyond the general credit, and extend to particular facts affecting his character, provided those facts are not material to the matter in issue.¹ The proper question in all cases is, whether the witness knows the general reputation of the person sought to be impeached or sustained, among his or her neighbors, for truth and veracity, which question the witness must answer in the affirmative before he or she can be asked what that reputation is.²

A witness may live in the same neighborhood and be intimately acquainted with the party whose general reputation is being questioned and never hear such reputation questioned or discussed, yet his testimony is inadmissible, unless he first gives an affirmative answer to the principal question. He must profess to know what that general reputation is before he is permitted to say whether it is good or bad;³ and if, in response to the principal question, the witness fails to give an affirmative answer, but volunteers his opinion as to what that reputation is, without being asked for it, such answer should be stricken out on motion.⁴ As above stated, this method of discrediting a statement of witness only applies to witnesses produced by the opposite party. When a party produces a witness he impliedly vouches for his credit and veracity, and it would be bad faith to permit him to produce a witness, with the mental reservation that, if the testimony of the witness is unfavorable, he will show by other witnesses that such witness' reputation for truth and veracity is such that he is unworthy of belief.⁵

¹Troup v. Sherwood, 8 Johns. Ch. 553.

²Gifford v. People, 148 Ill. 173, 176, 35 N. E. 754; Foulk v. Eckert, 61 Ill. 318; Frye v. Bank of Illinois, 11 Ill. 367; Cook v. Hunt, 24 Ill. 535; Crabtree v. Hagenbaugh, 25 Ill. 233, 79 Am. Dec. 324; Dimick v. Downs, 32 Ill. 570; Massey v. Farmers' Nat. Bank, 104 Ill. 327, 334; Laclede Bank

v. Keeler, 109 Ill. 385; Gifford v. People, 87 Ill. 210.

³Magee v. People, 139 Ill. 138, 141, 28 N. E. 1077.

⁴Gifford v. People, 148 Ill. 173, 177, 35 N. E. 754.

⁵United States v. Watkins, 3 Cranch, C. C. 441, 442, Fed. Cas. 16,649; Sheppard v. Yocum, 10 Ora. 402, 410; Stearns v. Merchants' Bank,

§ 258. Impeachment of witnesses — Continued.— The value of the testimony of the witness may also be depreciated by:

Fourth. Showing that the witness is in sympathy with the party calling him, or hostile to the opposite party. For the purpose of affecting the credibility of a witness it is always competent to show that he is hostile to the party against whom he is called; that he has threatened revenge, or that a quarrel exists between them. A court, jury or master scrutinize more closely and doubtingly the evidence of a hostile than that of an indifferent or friendly witness. Hence, it is always competent to show the relations which exist between the witness and the party against as well as the one for whom he is called. A witness, therefore, upon cross-examination, may be asked whether he did not on different occasions, to different persons, giving time, place and person, make remarks in regard to the defendant, showing a bitter and revengeful feeling toward him, and if he denies making such statements, counsel may, at the proper time, call the persons named in such questions to contradict him. An inquiry of this kind is not irrelevant, hence it is always competent to inquire, on cross-examination, whether a witness has not used expressions of animosity or revenge towards the party against whom he bears testimony, and if a witness denies that he has, evidence to contradict him may be introduced.²

As full belief will not be readily yielded to a witness who indulges hostility to the party against whom he is introduced, as to one who indulges no such hostility;³ and the administration of justice would be very defective, if every witness could, without contradiction, make himself out impartial and disinterested, and run no risk of exposure.⁴ While enmity is supposed to bias a witness in giving his testimony, and it is right that it should be known to the tribunal trying the issue when it exists, in such case, it is allowable to prove only the fact of such enmity or unfriendliness. The cause, merits,

58 Pa. St. 490, 492, 499; Commonwealth v. Donahoe, 188 Mass. 407, 408.

¹ Starks v. People, 5 Denio, 106, 108; Newton v. Harris, 2 Seld. 345, 346; Atwood v. Welton, 7 Conn. 66, 70.

² Phenix v. Castner, 108 Ill. 213, 214.

³ McHugh v. The State, 31 Ala. 320.

⁴ Geary v. People, 23 Mich. 220.

details of the quarrel can never be material nor pertinent — always tend to foist into the contention an immaterial issue, and therefore should not be received.¹ A mere admission that the witness is unfriendly to the party against whom he is called will not preclude such party from showing threats to commit personal injury;² or

Fifth. By showing that the witness is entitled to less credit because of the interest of the witness in the result of the litigation; or

Sixth. By showing that the witness has been guilty of an infamous crime. This may be done on cross-examination by forcing the witness to admit it, or if he deny it, then by other competent proof.³

§ 259. Impeachment of witnesses — Continued.— A witness produced by a party may also be impeached or his testimony discredited by:

Seventh. Showing, by cross-examination, that, from his history, character and antecedents, he is a person unworthy of belief; but there are certain limitations as to the extent of such cross-examination.

Where the matter sought to be brought out is one which has no bearing on the issues involved, and tends to disgrace the witness, it is his privilege to object, and in case he fails to do so it is in the discretion of the court to allow the question to be answered, it being an error affecting the credibility of the witness.⁴

In the opinion in the case cited will be found a full discussion of the right to cross-examine as to particular acts of immorality, which tend to disgrace the witness. It is proper, within the bounds of propriety, to be controlled by the trial court, that the character and antecedents of a witness may be subjected to a test on cross-examination, and that questions which go to exhibit his motives and interests as a witness, as well as those tending to show his character and antecedents, should be al-

¹ *Munden v. Bailey*, 70 Ala. 63, 68. See this question fully discussed upon the subject of this section generally, see 1 Greenl. Ev., § 450; 2 Phillips on Ev. (Cowen & Hill's and Edward's notes), 971; Best on Ev. (1st Am. from 6th Lond. ed.) 1080.

² See Wharton's Ev., §§ 549-567, and cases cited.

³ *City of South Bend v. Hardy*, 98 Ind. 577.

⁴ *Phenix v. Castner*, 108 Ill. 207, 214.

lowed.¹ This case also contains a discussion of the rule as to how far a cross-examiner may bring out individual acts of immorality to impeach the credibility of the witness.² To this end a large latitude is given, where circumstances seemed to justify it, in allowing a full inquiry into the history of witnesses, and, into many other things tending to illustrate their true character. This may be useful to enable the court or master to comprehend just what sort of person they are called upon to believe, and such a knowledge is often very desirable. It cannot be doubted that a previous criminal experience will depreciate the credit of a witness to a greater or lesser extent, in the judgment of all persons, and there must be some means of reaching this history. This rule does not conflict with that other rule that specific acts of misconduct, or specific acts of a disgraceful character, cannot be proved against a witness by other parties.³ Again, the testimony of a witness may be impeached, that is greatly impaired, or the statements of the witness wholly to be disregarded by:

Eighth. Their inherent improbability, that is, the variance of the statements of the witness from "the known course of nature."⁴

§ 260. Rights of witnesses in the master's office.—As we have already seen, the same rules of procedure govern a hearing in the master's office as upon a trial — that the same rules obtain in taking the testimony as in court. It follows, therefore, that the rights and privileges of witnesses in the master's office are the same as in court. On the examination of a witness before a master on a reference in any suit or proceeding pending in court the witness has the right, in the presence of the master, but not privately, to consult his own counsel, and may select for such purpose the counsel for the complainant or defendant as to the propriety or duty of answering any question propounded to him; and he may decline answering such question, taking upon himself the consequences of a proceeding as for a contempt if his objection is not well founded, or he may

¹ *Bessette v. The State*, 101 Ind. 85, 88.

² See, also, *Johnson v. Wiley*, 74 Ind. 233.

³ *Wilbur v. Flood*, 16 Mich. 40, 43, 93 Am. Dec. 203; *Spencer v. Robbins*,

106 Ind. 580, 586, 5 N. E. 726. See this subject fully discussed *ante*, "Cross-examination of Witnesses," §§ 251–255.

⁴ See *post*, §§ 346, 357.

demur to such question and then the matter will be heard on his demurrer as between him and the party proposing such question; but he is not bound to answer any question which will have a tendency to accuse himself of any crime or misdemeanor or expose him to any penalty or forfeiture. But that his answer may establish or tend to establish that the witness owes a debt or is otherwise subjected to a civil suit is no excuse for refusing to answer a question relevant to the matter in issue and proper to be put; and the witness and counsel are to be governed by the same rules which would control them on an examination before a jury in a court of law. It is not permitted that counsel selected by him shall "hold a whispering conversation with the witness, or retire with him during his examination for private consultation, or, after consultation, write out his answer, but his advice must be given under the eye and in the hearing of the master; there must be no room for suspicion of tampering with the witness or of suggesting his answers. More especially, the witness must be left, after being advised of his rights, to give his answers in his own language, without aid in writing or otherwise from counsel."¹

If a witness is interrogated upon any matter where he may lawfully decline to answer, it is his duty to state his grounds of refusal that the matter may, by the master, be certified to the court for determination. In the old books this will be found under the head of "Demurrer to Interrogatories." The witness was said to "demur, *demoratur*, i. e., he rests or abides on the question, perceiving (as he thinks) an objection, material and valid in point of law, which he may raise against being compelled to give any answer at all to a certain interrogatory, he waits before answering it."² There was no particular form for this demurrer. The witness, being under oath, stated his grounds for refusing to answer, which were taken down and returned as sworn to by him. The demurrer was "nothing but the witness' tender of reasons why he should not answer the

¹ *Stewart v. Turner*, 3 Edw. Ch. 458. *Meeker*, 3 Edw. (N. Y.) 452; *Mowatt v. Graham*, 1 Edw. (N. Y.) 18; *Winder v. Diffenderffer*, 2 Bland (Md.), 166; *Rapalje on Witnesses*, sec. 303; *Rapalje on Contempt*, sec. 66.

² *Gresley*, Eq. Ev. 77, 78, note. For the proper practice in the case of a demurrer of a witness, see *Bradley v. Veazie*, 47 Me. 85; *Forbes v.*

questions." The question was then brought before for argument.¹

§ 261. Rights of witnesses in the master's office continued.—A witness may decline to answer an interrogatory before a master in chancery under precisely the same circumstances as if he were being interrogated in open court, the difference being that, when a witness declines to answer a question propounded to him in open court, the judge rules upon the validity of his objection, whereas, before the master, the refusal of the witness to answer, and the grounds for such refusal, must be brought to the knowledge of the master by the certificate of the master. The grounds upon which a witness may decline to answer are very restricted. *First*. An attorney declining to divulge a matter of confidential information was acquired by reason of professional duty. *Second*. Where the answer might subject the witness to a criminal charge, etc. For the law upon this subject is referred to the standard works upon evidence, it is unnecessary to go into the subject more fully here. It is added that a witness has no right to decline to answer an interrogatory on the ground of immateriality, because "it does not concern the witness to examine what is the point in issue."² A witness examined before a master, has no discretion as to whether or not questions may or may not be answered, unless the answer would subject him to a penal liability, or any kind of punishment, or to a criminal charge, or to the forfeiture of his estate, or to the degradation of his character.³ A witness may be guilty of contempt of court by refusing to answer proper questions.⁴ If a witness refuses to answer a question, the master should pass

¹ Parkhurst v. Lowten, 2 Swanst. 194; Gresley, *loc. cit.* 78, 79 and notes. Hoffman, however, gives a regular form of this demurrer. Masters in Chancery, Appendix, form 27.

² Ashton v. Ashton, 1 Vern. 165; Gresley, *loc. cit.* 80.

³ Rusling v. Bray, 37 N. J. Eq. 174.

⁴ Gibon v. Albert, 7 Paige (N. Y.), 278; Holman v. Mayor, 34 Tex. 668-673; People v. Cassels, 5 Hill (N. Y.), 165; People v. Sheriff, 7 Abb. (N. Y.)

96; Matter of Allen, 18 S., 271, Fed. Cas. 208; Case, 120 Mass. 118, 121; 502; La Fontaine v. U. S., 88 N. C. 182; Stuart v. A., 158, 161; Rex v. Almon, 269; Ex parte Doll, 7 P. Lott v. Sandifer, 2 Rep. C. 167; Holman v. Austin, Roberts v. Garen, 2 Ill. of Morton, 10 Mich. 20 Hall, *id.* 210; Ex parte Blatchf. (U. S.) 118, Fed.

require such question to be answered before an attachment can be moved for.¹ Any wilful refusal to obey a lawful order made by a master is a contempt of court. For example, a refusal to appear before the master to testify, after being regularly subpoenaed so to do.² But there can be no contempt by refusing to obey an order which the master has no power to enter. Every court of judicature, as an indispensable attribute, is possessed of the power to require that every person who is present as a party, or who is a witness under examination, to disclose his or her face to the court, or to the jury if there be one. This is a necessary power, as without it there would be no certainty who the person really is who assumes to act as party or witness; but whether this power can be exercised over a person who does not appear as a party or witness is questionable. A master in chancery is only a subordinate officer of the court and not a court. It was therefore held that a master in chancery, who ordered a lady witness to remove her veil, she not having taken the stand as a witness, exceeded his authority.³

§ 262. Examination of defendant for discovery of assets — Order of court.—A court of chancery in the exercise of its inherent power of proceeding *in personam* may, where the issues in a cause demand it, and the interests of justice will be promoted thereby, require a party to appear before the court and submit to an examination; or may require him to appear before a master of said court and submit to such examination. This occurs in two classes of cases, and the course of examination is so dissimilar that it is well to bear this constantly in mind.

First. When a receiver is appointed and any trouble is anticipated in the discovery of, or reducing to possession, the assets ordered to be turned over to him, the defendant may be ordered to submit to examination touching these matters.

¹ *Fobes v. Meeker*, 8 Edw. Ch. 452. For the practice upon proceedings for contempt, see *Hammersley v. Parker*, 1 Barb. Ch. 25.

² *Brockman v. Augler*, 12 Ill. 277, 290; *Gihon v. Albert*, 7 Paige, 278; *Mowatt v. Graham*, 1 Edw. (N. Y.) 131; *Winder v. Diffenderffer*, 2 Bland (Md.),

166. On the subject of contempt by failure or refusal to obey lawful orders of the master, see this chapter, *post*, div. 17, "Contempt of Master's Authority," §§ 330-335.

³ *Rice v. Rice*, 47 N. J. Eq. 559, 21 Atl. 286, 11 L. R. A. 591.

Second. A party may be required by an order of submit to an examination as to the whole matters [by the pleadings. This course, however, is now issued, since, under the present statutes, all parties competent as witnesses, and, as such, like other witnesses, be compelled to appear and testify.

The line of examination in this second class of case a party appears by order of the court, or in obedience to a subpoena, is precisely the same as that of any other except, as we have already seen, that a more liberal examination of a party is permitted than that which is in case of a disinterested witness. The discussion of this section will, therefore, be confined primarily to the first class of cases, viz.: the examination of the defendant to ascertain what and the whereabouts of assets are turned over to a receiver. After the appointment and qualification of a receiver the next thing to be done is the actual possession of the assets. The word "actual" is used for the reason that in contemplation of law, upon the appointment and qualification of a receiver, the assets are constructively in his possession. Where the assets are visible, the receiver can at once take actual possession of them. Where their character, amount and whereabouts are unknown, the power of the court is necessarily invoked to aid the receiver in the discovery and obtaining such possession. This is done by an order requiring the defendant and others to appear before the master and submit to an examination touching the nature, amount and character of the property and effects of which the receiver is entitled, with a view to the discovery also, that the defendant shall, under the direction of the master, assign and deliver the same to the receiver. Upon an order a hearing is had in the master's office, and, after considering the evidence, the master "decides and directs" that the defendant shall assign and deliver to the receiver the property. The order under which such proceedings are had contains the following essentials:

First. What the order should contain.

(a) The order should direct that the complainant be permitted to examine the defendant, or any other person, on oath, and that for this purpose the defendant appear before the

(b) It should also provide that the master have power to compel the production of all such books and papers as he may deem necessary.

(c) That the defendant shall assign to the receiver, under the direction of the master, all such property, equitable interests, things in action and effects, or such parts or portions of the same, as are in his possession, or under his power or control, except such articles of personal property as are exempt by law from sale under execution against the defendant.¹

§ 263. Power of the court.—*Second.* This order must be obeyed until reversed, or modified by the court that made it, or by a higher court.

Where the court has jurisdiction of the parties and the subject-matter, an order of the court made in the premises, even though erroneous, must be obeyed. Where the court ordered the defendants to assign and deliver property of a corporation to a receiver, they are not justified in disobeying the order even though the true construction of the order requires the assignment and delivery of other property than that of the corporation. Such an order would simply be too broad, and in that regard wrong, but it would not follow that the defendants could disobey it for that reason. To justify a disobedience of the order would depend upon whether or not the court had jurisdiction. The principle is of universal force that the order or judgment of a court having jurisdiction is to be obeyed, no matter how clearly it may be erroneous;² or, as expressed by the supreme court of Wisconsin:³ If the court has the power to make the order of commitment in any supposable circumstances which might arise in the progress of the cause, then

¹ As to the essential provisions of this order see *Green v. Hicks*, 1 Barb. Ch. R. 300. For form of such order see *ante*, ch. IV, div. I, "Order of Reference," §§ 155, 156.

² *Tolman v. Jones*, 114 Ill. 147, 154, 28 N. E. 464; *People v. Sturtevant*, 5 Seld. 263, 59 Am. Dec. 536; *Sullivan v. Judah*, 4 Paige, 444; *Fennings v. Humphrey*, 4 Beav. 1; *Chuck v. Cremer*, 2 Phill. Ch. 113; *Richards v. West*, 2 Green's Ch. 456; 2 Barb. Ch. 274; *Wilcox v. Jackson*, 13 Pet. 498,

511, 10 L. Ed. 271; *Rhode Island v. Massachusetts*, 12 id. 657, 718, 9 L. Ed. 1233; *Walton v. Develling*, 61 Ill. 201, 206; *Darst v. The People*, 62 id. 306; *Dickey v. Reed*, 78 Ill. 261, 274; *Rapalje on Contempt*, § 39; *Wilcox v. Harris*, 59 How. Pr. 262; In re *Remington*, 7 Wis. 648; *Lutt v. Grumont*, 17 Ill. App. 308; *Berkson v. People*, 51 id. 102, 154 Ill. 81, 39 N. E. 1079.

³ In re *Rosenberg*, 90 Wis. 581, 584, 63 N. W. 1063.

the order is valid until reversed, however erroneous it may be in the particular circumstance.¹

The whole matter of enforcing a discovery of assets of a defendant, where a receiver is appointed under a decree, is within the power of the court. It is within its direct and indirect the manner in which the discovery shall be made may require the defendant to make discovery by production of books and papers, by oral examination or statement, or by all these modes, as shall appear to be necessary and most feasible and conducive to the end. All this relates to practice, not to power; to form, not to substance. Error in mere form, if it exists, does not vitiate jurisdiction. To the end that the discovery shall be complete and effectual, the court has power to require the defendant to use all the means within his power for acquiring the information necessary to enable him to give the discovery. And the court has no right to be deceived by untruths, nor to be satisfied by evasive or prevarication. Prevarication by a witness has the same effect upon the administration of justice as a refusal to answer. To refuse to answer in effect it puts the witness in the position of standing against the authority of the court, and thwarts the court in its aim and purpose of doing justice between the parties.

§ 264. Power of the court — Continued.— Where a partner of an insolvent firm files a bill for a dissolution and for the appointment of a receiver to collect the assets for the benefit of the creditors, and the other partner thereto and a receiver is appointed, this amounts to a receivership of the assets for the benefit of creditors, to be administered by the court, under the direction of the court. In such a proceeding the court has the power to enter orders requiring each partner to turn over the assets to the receiver and to submit to an examination under oath before the court in chancery, and to compel obedience to such orders by contempt and imprisonment. And in such a case the partner

¹In *re Milburn*, 59 Wis. 24, 34; 205; 1 Daniell, Ch. 1. In *Tallman v. McCarty*, 11 Wis. 401; 724.

People ex rel. Johnson v. Nevins, 1 Hill, 154. ²In *re Rosenberg*, 90 N. E. 1079. *Berkson v. The People*,

³1 Pomeroy, Eq. Jur. (2d ed.), §§ 204, N. E. 1079.

refuse obedience to the order for the reason that creditors have been permitted to come in, under an intervening petition and erroneously obtain permission to participate in the examination before the master.

Under such an intervening petition praying that the partners be required to appear before the master in chancery for the purpose of assigning their property to the receiver and surrendering all books and papers bearing upon the partnership, and that each of them be cited to appear before the master to be examined in reference to the state of the partnership and its property; and after a hearing on this petition, all parties being present, the court ordered "that Henry Leopold and Charles M. Leopold appear before Alexander F. Stevenson, a master of this court, to whom the cause is hereby referred, for the purpose of being examined in reference to the state of said copartnership and its property; that the said master fix the time for such examination, and issue subpoenas for the attendance of such witnesses as may have any knowledge of the affairs of said copartnership, and that any creditor of said firm may participate in said examination." In obedience to the order of the court the partners made an assignment of the firm property to the receiver, but refused to appear before the master for examination, on the ground that the order was invalid. The chancellor entered a rule against them to show cause, etc. They answered, setting up "a want of authority to make the order which they were charged with violating." The court held the answer insufficient and fined them for contempt, from which judgment they appealed. In passing upon the question the supreme court say: "The case, on its merits, turns upon the question whether or not the order of the 5th of December, 1890, was valid. A party cannot be guilty of contempt of court for disobeying an order which the court had no authority of law to make. Want of power, as here used, is not, however, to be confused with mere irregularity in the exercise of power, for if the court has jurisdiction of the parties, and legal authority to render the order, then a party cannot stand in defiance of it, however improvidently or erroneously made.¹ That part of the order which permitted creditors of

¹Cape May & S. L. R. R. Co. v. 251; Tolman v. Jones, 114 Ill. 147, 28 Johnson, 35 N. J. Eq. 425; Mayor of N. E. 464.
New York v. Conover, 5 Abb. Pr. 244,

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examination, even if erroneous, nor excuse appellant from objecting that it was regular. If he had not appeared for an examination, or if he had asked improper questions, or if he had objected in the examination, his objection would be overruled by the action of the court; but his conduct in that regard, is not a ground for reversal of the court."¹

t — Continued.— The court held that the statutes of that state, which required a party to answer the court's conduct in refusing to appear for an examination, to his business, and to produce books and papers, without evasion or pretense, to provide for its proper administration, and to provide for its proper power to punish as for contempt, for failure to produce books and papers to make discovery on or to answer questions, or for prevarication, is ample authority for the action of any statute.²

The defendant in a creditor's bill, to answer and deliver to the receiver, his property, and his interest in the estate, and to deliver to the receiver, his account, vouchers, and to appear before the receiver, as the master should, appeared before the receiver, and disclosed the

447, 489; *People v. Wilson*, 10 Cal. 447; *Mariner v. Dyer*, 2 Greenl. 128; *State v. White*, Charl. 128; *State v. Lansing*, 9 Johns. 395, 400; *State v. Tipton*, 1 E. 290; *Clark v. People*, 1 Bree. 177; *United States v. Cranch*, 32, 8 L. E. 47; *parte Smith*, 28 Ind. 47; 1 E. 63 N. C. 397; *Stuart v. People* (Ill.) 395.

he had at least \$7,500 of money, derived from the sale of goods, for which he failed to account, which fact the master reported to the court, and also that he had not truly divulged to the receiver his assets and property in his possession or under his control, and had wilfully secreted the same, and had contumaciously refused to testify and divulge the whereabouts of his assets and property, it was held that such defendant was guilty of a contempt of court, and that the court had the power to order that he stand committed to the common jail of the county to answer for his contempt, and that he remain in custody until he comply with the order of the court, and, among other things, fully and truly submit to an examination and testify and discover to the receiver, before the master, concerning his assets and property in his possession or under his control, and account for and turn over to the receiver the sum of \$7,500 so found to be in his possession and under his control.¹

§ 266. Power of court — Continued.— The appointment of a receiver is the actual means employed by the court in taking possession of the subject matter of litigation. The receiver being but the agent or officer of the court, his possession is exclusively the possession of the court, the property being regarded as in the custody of the law, for the purpose of prevention of its waste, destruction, secretion, or misappropriation, to enable the court, by a final decree, to dispose of it according to the rights and priorities of the original parties to the suit, or other parties in interest who may come in and ask the aid or protection of the court.² The right to the possession of the property in controversy is vested *eo instanti* in the receiver by the order of the court, or, perhaps, more properly speaking, the court by the order of appointment instantly divests the parties of all power over it, and clothes the court with the right to the control, management and final disposal of the same.

It follows, as a matter of course, that any attempt to inter-

¹ *Berkson v. The People*, 51 Ill. App. 102, 154 Ill. 81, 39 N. E. 1079. well, 68 N. C. 400; *Mays v. Rose*, Freem. (Miss.) 703; *De Visser v.*

² *Myers v. Estill*, 48 Miss. 372, 401; Blackstone, 6 Blatch. 235, Fed. Cas. 3,840; *In re Merchants' Ins. Co.*, 3 Robinson v. Atlantic & Great Western R. Co., 66 Pa. St. 160; *Angel v. Biss* 162, 165, Fed. Cas. 9,441. Smith, 9 Ves. 885; *Skinner v. Max-*

fare with the receiver in discharging his duty under the of the court, whether in obtaining the actual possession property described in the order or to disturb such possession afterward, is a resistance of a rightful order and of the p of the court and, as such, will be treated as a contempt of and punished accordingly.¹ This power does not depe the regularity of the order appointing the receiver, an no justification of a resistance to the receiver in attempt take possession, or of a disturbance of such possession ward, that the appointment may have been illegally or im dently made. "While the order continues in existence court requires that it shall receive implicit obedience, an not permit its legality to be questioned by disobedience court itself being always open to any proper application ing in question the legality or propriety of its order."²

§ 267. Defendant must obey order.—Obedience to an order must be full and complete, and must cover ea its branches or divisions:

(a) The party named must appear before the master, i time and place named in the order, or if not named i order, then at such time and place as the master shall c

In New Jersey it is the practice for the court, in the appointing the receiver, to direct the defendant to appe fore a certain master, naming him, and designating the for his appearing, thus: "It is further ordered, that the defendant appear and make discovery on oath concerni property and things in action, before ———, one c masters of this court, on the ——— day of ———, 19—, s hour of ——— o'clock in the ———noon." But in Illino practice is simply to require the defendant to appear bel

¹ *Ellis v. Boston, Hartford & Erie R. Co.*, 107 Mass. 1; *Ex parte Dunn v. S. & C. R. Co.*, 8 S. C. 207; *Noe v. Gibson*, 7 Paige, 513; *Lane v. Sterne*, 3 Gif. 629; *Skip v. Harwood*, 3 Atk. 564; *Hull v. Thomas*, 8 Edw. Ch. 286; *Broad v. Wickham*, 4 Sim. 511; *Russell v. East Anglian R. Co.*, 8 Mac. & G. 104; *Langford v. Langford*, 5 L. J. (N. S.) Ch. 60; *Vermont & Canada R. Co. v. Vermont Central R. Co.*, 46 Vt. 792; *Spinning v. Ohio Life Ins. Co.*, 3 Disney, 836, 868; *Chafee v. Qu Co.*, 13 R. L. 442; *Secor v. T. P R. Co.*, 7 Biss. 513, Fed. Cas. King v. O. & M. R. Co., 7 Biss. 51 Cas. 7,800; *High on Receivers* ² *High on Receivers*, § 165; *J Holbein*, 2 Edw. Ch. 188; *Woo v. Earl of Lincoln*, 8 Swan Richards v. West, 2 Gr. Ch. (N. 456; *People v. Sturtevant*, 2 N. 59 Am. Dec. 536; *Sullivan v. 4 Paige*, 444.

master, naming him, leaving the master to fix the time for hearing and giving notice thereof. In either event, probably, it would be well to serve the defendant with a copy of the order, especially where the order has been entered prior to the appearance of the defendant. A fear upon his part that the proceedings in the master's office will be irregular or improper will not justify a refusal to appear. Thus, a fear that creditors will attempt to ask improper questions, or otherwise improperly participate in the examination, is no excuse. If improper questions are put, he may decline to answer, and is entitled to the protection of the court; but he cannot, in anticipation of misconduct in that regard, stand in defiance of the authority of the court by refusing to appear before the master for examination.¹

(b) The defendant, so ordered to appear before the master, must not only obey such order by appearing at the time and place named therein, or specified in the master's summons, but he must also submit to a full and fair examination, touching the issues submitted to the master.

The hearing in the master's office, under such an order, has no reference whatever to the merits of the matters involved in the litigation, but, on the contrary, is limited solely to the objects specified in the order itself. Under it the complainant's solicitor will be able to obtain from the defendant, and from other persons whom he may think proper to call before the master as witnesses, any information in their power relevant to the subject-matter of the reference. But he will not be authorized to examine the defendant, or any other person, as to other matters which have nothing to do with the appointment of the receiver, or the ascertainment of the possession, nature, situation, values, character, or other particulars, of the property which is to be assigned to the receiver, or to be delivered to him by the defendant.² The vastness of the amount frequently involved, the consequent bitter contest for possession between the receiver, as an officer of the court, upon the one part, and the defendant, his fraudulent grantee, or grantees, and other confederates, upon the other part, the latter resorting to every ingenious device which cunning can invent to defeat the ob-

¹ *Leopold v. The People*, 140 Ill. 553, 30 N. E. 848.

² *Green v. Hicks*, 1 Barb. Ch. R. 309, 317.

ject of the hearing, render such a proceeding one of the most important duties ever required of the master to perform. The master, in such cases, finds himself confronted by the pleadings for the complainant, who usually conceives it to be in the interest of his client to broaden the scope of the inquiry beyond the actual limits authorized by the order of reference. Insistent in his effort to inquire into and follow up every transfer of property, however remote in time the transfers may have been, also the motive inducing such transfers, the other side, counsel for the defendant, equally insistent in circumscribing the inquiry within the narrowest possible bounds and thus virtually defeating the object of the reference. The master, however, will have but little to do but properly regulating the proceeding by keeping in mind as a pole-star, the actual object of the reference and the terms of the order itself. Under an order of court requiring the defendant and others to appear before a master and submit to an examination as to the property and effects in the possession of the defendant to be turned over to the receiver, the examination must be confined strictly to the objects of inquiry prescribed in the order. Under such an order all the plaintiff has a right to ascertain by the examination of the defendant, or others, is as to the nature and particular description of the property which the defendant has in his possession or control; or of which he had the possession, or the time to which the order of reference relates, the subject of such examination and proceedings before the master being to enable the master to decide and direct what the defendant shall assign and deliver to the receiver, or to authorize the receiver to take possession of, so far as the defendant himself is able to give such authority.¹

§ 268. *Scope and extent of investigation.*—It is tempting to prescribe a set of iron-clad rules applicable to all cases the following subjects may be considered as objects of inquiry:

First. The defendant may be asked and “he is to answer the direct question, what property, equitable interests and things in action, and effects, he owned or had

¹ *Green v. Hicks*, 1 Barb. Ch. R. 309, 317.

interest in at the time specified in the order of reference." . . . "He is bound to answer and disclose what property was in his possession, or under his control, at the time of such examination, so as to be the proper subject of an order or direction of the master that he shall deliver the same to the receiver."¹

Second. The defendant is not only bound to answer the direct question, what property, equitable interests, things in action, and effects, he owned or had a beneficial interest in, at the time of the order of reference, but every other question which may aid in the ascertainment of the fact as to what property was owned by him at the time of the commencement of the suit, or what property was then held by others, in which he had any beneficial interest. "It is not sufficient, therefore, that the defendant shall answer generally that he had no property, or none other than that specified by him in his answer to the general question, for a more minute and particular examination of the facts may show his general answer to be erroneous."²

Third. The defendant may be asked what property he owned or had in his possession shortly previous to the filing of the complainant's bill, and what became of it, as this is one way of ascertaining what property he had in his possession, or under his control, at the time of filing the bill.³

The expression, "shortly previous to the filing of the complainant's bill," is quite indefinite, and, as said by Judge Tuley, in a case arising in the circuit court of Cook county, Illinois, no general rule or limitation as to time can be laid down; that what would be reasonable as to time in one case might be unreasonable in another, and every case; therefore, must depend on its own peculiar circumstances.⁴

Fourth. If the defendant answers that he sold it, absolutely, before the commencement of the suit, he may be asked what was the consideration, and how it was paid. This is for the purpose of ascertaining whether the proceeds of the sale, or

¹Green v. Hicks, 1 Barb. Ch. R. 309, 317.

²Id.

³Id. 318.

⁴Cane v. Dernburg, 11 Nat. Corp. Rep. 509. In this case there was a bit-

ter contest as to the limit of the defendant's examination, and an appeal was had to the chancellor, who, after a full hearing, entered an order giving the master specific instructions. Id.

some part thereof, are not in his hands, or still due to him, at the time of filing the bill, or at the time when he was required, by the order, to assign and deliver over his property to the receiver.¹

The court has no power over a third party, who obtained possession of property from the defendant prior to filing the bill, to compel the surrender thereof to the receiver. If, prior to the commencement of suit, the complainant knows of fraudulent transfers by the defendant to third parties, he should make such fraudulent grantees co-defendants; or, if such fact is learned afterward, the proper course is to amend the bill by making such grantee or assignee a party to the suit, and thus extend the receivership to him.² If this course is pursued such fraudulent grantees or assignees may be brought before the master, together with the principal defendant; and, under the direction of the master, be required to deliver the property in controversy to the receiver to be held by him until the court can determine the title thereof upon a final hearing upon the merits.

Fifth. If in answer to the above question the defendant shows that the property was absolutely sold or assigned and paid for, or that the payment thereof was provided for previous to the filing of the bill, then the complainant is not at liberty to question the defendant as to the object and motive of such sale or assignment, for the mere purpose of ascertaining whether it was intended to defraud creditors. Such inquiry is irrelevant to the purpose of the reference. In such a case the defendant, not having the possession of the property, and it being beyond his power and control, he could not be required by the master to deliver it to the receiver.³

Sixth. The defendant may be questioned and required to answer whether he has disposed of any property which was in his possession at the time of filing the complainant's bill; and, if so, what property; and what interest he had in such property at the time of filing the bill; and what became of the proceeds of the sale thereof.⁴

¹ Id.

² Green v. Hicks, 1 Barb. Ch. R. 809, 814, 815; Edmeston v. Lyde, 1

Paige, 637, 19 Am. Dec. 454; Cassilear v. Simons, 8 Paige, 272.

³ Id.

⁴ Id.

Seventh. If property owned by the defendant, or under his control, at the time of filing the bill, is under mortgage, or subject to any other lien, he may be required to state the amount still remaining due thereon and when it is due and payable. It is not sufficient for him to state generally his belief that the property is not worth more than the amount due, for the reason that he may be directed by the master to assign and deliver such property to the receiver to enable the latter to satisfy the amount of the lien, or sell the property subject to the lien, as he may see fit.¹

In the examination of the defendant to ascertain what assets are to be turned over to the receiver it is error for the master to go beyond the precise issue submitted to him. It is a mistake for him to suppose, under an order for the defendant to appear before him for examination as to what assets are in his possession to be turned over to the receiver, that he is authorized "to try the whole matter in litigation between the parties." If the master proceeds upon this erroneous theory and permits interrogatories to extend beyond the legitimate purpose of obtaining a delivery of property which the defendant has a right to control, the proper course is to bring the question before the court by an appeal from the master's decision.² The power of the court in such cases to order the defendant to appear before a master and submit to an examination touching his assets does not permit a "fishing expedition" to find assets fraudulently parted with by the debtor prior to the assignment, or appointment of the receiver. As to such property in the hands of third persons, the court has no power to summarily place the assignee or receiver in possession, but he is remitted to his right of action the same as any other party.³

¹ *Id.*, p. 319.

² *Fitzburgh v. Everingham*, 6 Paige, 29.

³ *Wait, Fraud. Con.*, § 116; *Osgood v. Laytin*, 48 Barb. (N. Y.) 463; *aff'd*, 5 Abb. Pr. (N. S.) 9; *Hamlin v. Wright*, 23 Wis. 491, 492; *Barton v. Hosner*, 24 Hun, 467, 469; *Porter v. Williams*, 9 N. Y. 142, 59 Am. Dec. 519; *Underwood v. Sutcliffe*, 77 N. Y. 58, 62; *Bostwick v.*

Mencke, 40 N. Y. 383, 386; *Manly v. Rassiga*, 18 Hun, 288, 290; *Kennedy v. Thorp*, 51 N. Y. 174; *Olney v. Tanner*, 18 Fed. Rep. 636, 10 Fed. Rep. 113; *Rodman v. Henry*, 17 N. Y. 482, 484; *Lathrop v. Clapp*, 40 N. Y. 328, 333, 100 Am. Dec. 498; *Brown v. Gilmore*, 16 How. Pr. 527; *Teller v. Randall*, 40 Barb. 242; *Fields v. Sands*, 8 Bosw. 685; *Becker v. Torrance*, 31 N. Y. 631, 637.

§ 269. Scope and extent of investigation — Courts are averse to making any orders that will in a summary way with the possession of one who is the owner in good faith of the property in controversy by purchase from a stranger, or from the debtor himself before institution of suit. One purchasing or receiving *after* filing of bill and service of summons would be subject to equities under the doctrine of *lis pendens*. The court of Michigan upon this subject say: "What right have we in this summary manner to dispossess of property which has undisputably and for a long time been in his rightful possession? If such an order can be made, no one is safe in the possession of anything; every other sees fit to claim by suit in equity. The principle is at least as old as *Magna Charta* that a man shall have his property before dispossession, and we cannot sanction any departure from it that shall leave every one to the mercy of a summary proceeding on which an inquiry into the facts and rights may be imperfect and generally one-sided. We have occasion to point out the illegality of such proceedings in many cases to which we refer."¹

(c) In addition to making a full disclosure as to the assets of the debtor upon such examination, the order provides for the production on his part of all books, papers and documents pertaining to the same.²

(d) The remaining branch of the order requires the debtor to assign and deliver all his assets, so discovered by the examination aforesaid, under the direction of the master. The direction is required to be implicitly obeyed by him.

§ 270. Scope and extent of investigation — Courts are averse to making any orders that will in a summary way with the possession of one who is the owner in good faith of the property in controversy by purchase from a stranger, or from the debtor himself before institution of suit. One purchasing or receiving *after* filing of bill and service of summons would be subject to equities under the doctrine of *lis pendens*. The court of Michigan upon this subject say: "What right have we in this summary manner to dispossess of property which has undisputably and for a long time been in his rightful possession? If such an order can be made, no one is safe in the possession of anything; every other sees fit to claim by suit in equity. The principle is at least as old as *Magna Charta* that a man shall have his property before dispossession, and we cannot sanction any departure from it that shall leave every one to the mercy of a summary proceeding on which an inquiry into the facts and rights may be imperfect and generally one-sided. We have occasion to point out the illegality of such proceedings in many cases to which we refer."¹

¹ *McCombs v. Merryhew*, 40 Mich. 721, 725. The other cases referred to by the court are *Salling v. Johnson*, 25 Mich. 489; *People v. Judge of St. Clair Circuit*, 81 Mich. 456; *People v. Jones*, 83 Mich. 303.

² The subject of the production of books and papers in the master's office has been so treated under a previous division of this chapter, that it is unnecessary to say anything further. See *Chapter on the Production of Books and Papers*, p. 210.

be delivered to the receiver. It was never the design to permit the receiver, under a general direction to take possession of the debtor's property and effects, to go and seize such as he, acting on his own judgment, should deem to fall within the scope of the order. Such a practice would inevitably lead to collisions of a violent character, between the receiver and persons possessing, or claiming to possess, the property alleged to belong to the debtor. There is no necessity for such collisions, and the practice of courts of equity is so adjusted as to protect the receiver from their occurrence.

In stating this practice in the court of chancery as it formerly existed in the state of New York, the court, in the case from which the foregoing extract is taken, further say: "The master, from time to time, on taking the examinations and proofs, made orders designating specifically the effects which, in his judgment, were shown to be in the possession or under the control of the judgment debtor, and directing him to deliver the same to the receiver. If his effects were in the immediate presence of the master the direction was to deliver them forthwith. If they were not present but consisted of evidences of debt, personal ornaments, or like portable articles, the master directed them to be brought and delivered to the receiver at a time and place designated, either in the master's presence, or elsewhere in his discretion. If the effects were ponderous articles, such as household furniture, the master appointed a day and an hour, at the place where they were situated, for the debtor to attend and deliver the same to the receiver. Thus, the receiver's duty was simply to attend at the time and place appointed, and receive, and take into his keeping, certain specified articles and property. In case of household furniture or other ponderous goods, he would of course provide himself with the requisite assistance to remove them to a suitable depository. If under such an order, the debtor refused to deliver the articles, the plaintiff in the suit, as the actor in the litigation, applied to the court for an attachment. On that motion, the debtor, by way of appeal from the master's order, was at liberty to show that his direction for the delivery of any or all of the chattels was erroneous. Unless he could satisfy the court of such error, process of attachment ensued; and the debtor was compelled, by its consequent penalties, to comply

with the order made by the master. In the whole course of the proceeding there was no occasion for the receiver to act except under the specific order of the court; nor then in a mode which would involve him in personal collisions, or in a disorder or violence. He acted as an officer of the court, protected by its strong arm, in the peaceable, yet efficient, exercise of his duties." The learned judge writing the opinion further adds: "So far as I am advised, the practice which I have stated was established long since in the late court of chancery, and is still the proper practice to be pursued in proceedings against judgment debtors, wherever a receiver is appointed."¹

§ 271. **Appeal to the chancellor.**—During the progress of such a hearing either party may appeal to the chancellor. If the debtor fails or refuses to appear before the master, or, by refusing to answer questions, or by answering evasively, does not fully and fairly disclose the assets in his possession, or if he fails or refuses to produce the books, papers and documents required, or to assign and deliver his assets to the receiver, the complainant may require the master to certify the facts to the chancellor, and may ask for a rule upon the debtor to show cause why he should not be attached for contempt. While, on the other hand, if the debtor believes, or is advised, that any order or requirement of the master is improper and beyond his authority, he may ask the facts to be certified, and appeal to the chancellor for protection. If a question is asked which his counsel believes to be irrelevant to the issues submitted, he may advise his client to decline to answer. Such refusal is in the nature of a demurrer to the evidence. The question then comes before the court on application to compel him to answer and to punish him for contempt.²

It is not only the right but a duty of counsel for the defendant debtor to see the examination is confined to the legitimate objects of the reference, and that it does not extend to matters affecting the merits. Such examinations are reduced to writing, sworn to and signed by the defendant, and if the debtor makes any statement against his interest it may be used against him upon a subsequent hearing of the merits. This

¹ *Dickerson v. Van Tine*, 1 Sandf. (N. Y.) 723, 726-728.

² *Fitzburgh v. Everingham*, 6 Pa. 29; *Edwards on Receivers*, 107.

equally true whether the questions put to the defendant, upon a reference as to this collateral matter, were pertinent to the issues then submitted or not.¹ With these safeguards thrown around him, as said by Chancellor Walworth, "If the investigation is properly conducted by the master, no honest defendant can be injured thereby."²

§ 272. Forms of transfers of assets to receiver under an order of court.—The assignment or transfer of personal assets, made to a receiver in obedience to the order of court, may be in form as follows:

Assignment of Personal Assets to a Receiver.

This indenture, made the — day of —, in the year 19—, between C. D. and E. F., heretofore partners in trade doing business in the city of New York under the style of —, of the first part, and A. B. of, etc., receiver of the estate and effects hereinafter referred to, appointed by the supreme court of the state of New York, of the second part; whereas in and by an order of the said court, before, etc., in a certain action wherein the said C. D. was plaintiff and the said E. F. was defendant, it was ordered that it be referred, etc. [*here recite the order*], and whereas the said party of the second part has been duly appointed such receiver, and has given and filed the requisite security, pursuant to the rules and practice of the said court and to the provisions of the said order: Now this indenture witnesseth, that the said parties of the first part, in obedience to the said order, and in consideration of the premises aforesaid, and of one dollar to each of them in hand paid by the said party of the second part, at or before the execution hereof, the receipt whereof is hereby acknowledged, have, and each of them hath, conveyed, assigned, transferred and delivered over, and by these presents do, and each of them doth, convey, assign, transfer and deliver over unto the said party of the second part, under the direction of the said referee [*master*], testified by his approval indorsed hereon, all and every the stock in trade, good will, estate, real and personal, chattels real, moneys, outstanding debts, things in action, equitable interests, property and effects whatsoever and wheresoever, of or belonging or due to the said parties of the first part, as partners of the said firm of — or to the said firm itself, or in which they or either of them, as such partners, or the said firm, had any estate, right, title or interest, at the time of filing the complaint in the above recited action; and which complaint was filed on the — day of — last, and also all deeds, writings, leases, muniments of title, books of account, papers, vouchers and other evidences whatsoever

¹ Edwards on Receivers, 103-108.

² Fitzburgh v. Everingham, *supra*.

HEARING IN THE MASTER'S OFFICE.

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 in the said party of the second part
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Assignment of Real Estate to a Receiver
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§ 273. **Examination of a defendant upon a reference as to merits.**—In a chancery case, under an order for an accounting, the court, in addition to requiring the parties to produce before the master all books, papers and writings in their custody or power relating thereto, may direct the accounting party to appear before the master and submit, under oath, to an examination under his direction. This appears to be the long-established practice of the court, and is considered, in the books, as a thing very much of course. Lord Eldon considered it as the usual direction, to examine the parties as the master shall see fit, and, under the English practice, that “he settles the interrogatories.”¹ Lord Hardwicke admitted it to be a general direction in a decree, to examine a party on interrogatories before the master, as he shall direct, and the said party might be interrogated *toties quoties*.² Chancellor Kent says: “Probably not a volume of reports can be opened without meeting with instances of the practice.”³ He further adds: “The practice itself is, according to the constitution of the court, which appeals to the conscience of the party. A right to discovery, by the party’s own oath, is one of the original and most essential heads of equity jurisdiction.” . . . “Every defendant, notwithstanding his interest, is bound to answer, in the first instance, under oath, to the charge in the bill; and having thus answered, as a party, it is said that he should not be examined in chief, in the character of a mere *witness*. But when a reference is ordered upon hearing, then the inquiry becomes necessarily minute, and a new and more detailed investigation is opened, to which the general inquiries in the bill were not adapted. Here the same policy and principles of the court, which required an answer to the bill, apply, and call again upon the conscience of the party *as party*, for a further disclosure adapted to the *minutiae* of the inquiry. The same reasons which required an answer, in the first instance, require an examination in the second. . . . It is the fundamental doctrine of this court that the party is bound to an-

¹ *Purcell v. M’Namara*, 17 Ves. 589; Lord Chancellor Talbot, in *Piddock v. Brown*, 3 P. Wms. 288.

² *Cowdsale v. Cornish*, 2 Ves. Sr. 270.

See also *Kirkpatrick v. Love*, Amb.

³ *Hart v. Ten Eyck*, 2 Johns. Ch. 518, citing *Bromly v. Child*, Dickens, 128; *Cornish v. Acton*, id. 149.

swer on oath to *every fact* material to the right of the plaintiff. The disclosure must be made either by the answer to the bill or by examination before the master. In one way or the other, the truth is to be sifted out, and the conscience of the defendant probed to its deepest recesses."¹

§ 274. Examination of a defendant as to merits—Continued.—In actions at law, parties could not be called upon to testify as witnesses, hence the great advantage of this power lodged in courts of equity. Since the adoption of statutes authorizing all parties to become witnesses, the necessity, in a majority of cases, for a resort to equity for relief has ceased, and bills with this object in view have become of less frequent occurrence. Yet, because of the advantages of the power given the chancellor to order a reference to a master for a hearing instead of trial by jury, and the facility with which an order of reference may be had, this still remains one of the most important branches of equity jurisdiction.

The foregoing remarks are made as supplementary to the real subject here discussed, viz.: the summary power of the court in a case of a creditor's bill, or an assignment, or in any other case where a receiver is appointed, to order the proper property in controversy to be turned over to the assignee, or receiver, and to this end, order the parties to appear before the court or a master in chancery, and submit to an examination, and for the purpose of showing that the making of such an order is but the exercise of an ancient and original power of the court of chancery. In such a case the court is vested with the administration of the assets, and it would be strange indeed if it had only the power to vest the title in the officer but no power to put him in possession.

Under a creditor's bill the court may order property to be turned over to a receiver, and may order parties having possession of same to submit to an examination under oath as to such property, or the order may require them to submit to such examination before the court. Such power is not confined to creditors' bills, but extends to all cases where the assets are being administered by the court for the benefit of creditors.

¹Hart v. Ten Eyck, 2 Johns. Ch. 513.

²Leopold v. The People, 140 Ill. 580 N. E. 343; High on Receivers, § 4.

Where a defendant in a bill for an accounting is required by an order of the chancellor to submit to an examination as a witness, the reference has the effect of a supplementary bill of discovery;¹ or, as it was said in another case under such an order, "the examination has the same effect as that of an answer to the bill."² To the points upon which he is examined by the complainant his answers are evidence for him, precisely as they would have been in an answer to a bill for a discovery, but he cannot give evidence for himself upon matters to which he is not examined by the opposite party.³ Such testimony so volunteered would have no greater effect than matters irresponsible to the bill set up in the defendant's answer thereto.

§ 275. Continuances — Adjournments.— Each party must have a fair opportunity to introduce his evidence before the master. Sometimes delays for this purpose are unavoidable. In the interest of justice continuances or adjournments, to enable a party to produce further evidence, are as necessary upon hearings before the master as in case of trials in court. This matter, however, rests largely in the discretion of the master, and such discretion will not be interfered with by the court unless in case of abuse and where it appears that such interference is necessary to prevent injustice. A party who has had a fair opportunity to introduce his evidence and failed to do so has no right to complain of the master because he refused to grant further indulgence. Thus, where a case was adjourned from time to time and the master finally set a date for hearing and announced that it was peremptory and that there should be no further continuance by the master at the instance of either party, it was held that the master properly overruled a request of counsel to again adjourn the case that certain interrogatories, which had been prepared by counsel, might be answered. The action of the trial court in refusing to encourage irregular and lax proceedings in the master's office was commended, the court remarking that "we concur in and commend his effort to restore proceedings to a course of such regular con-

¹ Hart v. Ten Eyck, 2 Johns. Ch. 513.

² Alexander v. Alexander, 8 Ala. 796, 801; Armsby v. Wood, Hopkins,

³ Templeman v. Fauntleroy, 8 Rand. Ch. Rep. 229.

424, 444.

duct and rational practice as shall comport with the proper speeding of the cause on trial before the master."¹

The conditions upon which a continuance will be allowed and the length of time granted to a party to enable him to produce further evidence rests also largely in the discretion of the master, unless, as is sometimes the case, such time is limited by a statute or a rule of court. For example, a New Jersey chancery rule provides for the continuance of a hearing to a future day on account of the absence of witnesses, and sets out fully the conditions upon which such continuance may be made. The rule is carefully and accurately drawn, is an important one, well calculated to prevent unnecessary delays and should be strictly enforced;² and in the southern district of New York the master is forbidden to adjourn a reference for more than ten days without the written consent of all parties, unless such adjournment is desired by one of the judges.³

If a party desires further time for the production of evidence, his proper course is to move an adjournment of the hearing for such purpose, and, if the master refuse so to do, upon coming in of the report, move the court to re-refer the matter to the master with directions. The error cannot be raised by exceptions, as this is not the correct practice.⁴ When a party, upon a hearing before a master, makes a reasonable request, in good faith, for an adjournment to enable him to produce further testimony, such request should be granted.⁵ An unreasonable request should be denied and, if not, may be ground for interference by the chancellor. The fact that the counsel of one of the parties desires to go on a pleasure excursion does not justify the master in continuing a hearing for three months.⁶

§ 276. Opening up report for further evidence.—Maddox says that, "after the master has settled his report, no further evidence is admissible,"⁷ and so it was held in *Thompson*

¹ *Third National Bank v. National Bank*, 58 U. S. App. 148, 158, 159; 86 Fed. 872.

² N. J. Ch. Rule, No. 199.

³ Rule 115, U. S. C. Ct. S. D. N. Y. See *Sewell v. Draughn* (Tenn.), 44 S. W. 210.

⁴ *Douglas v. Merceles*, 24 N. J. Eq.

25. See also *Tyler v. Simmons*, Paige, 127.

⁵ *Tucker v. Tucker*, 28 N. J. Eq.

Douglas v. Merceles, 24 N. J. Eq.

⁶ *Forrest v. Forrest*, 3 Bos. (N. H.) 650, 655.

⁷ 2 Ch. Prac. 664, Ed. 1897.

Lambe,¹ cited in support of his text. The report of this case does not show, however, that the failure to produce the evidence until after the master had settled the report was due to accident or inadvertence, and for aught that does appear such failure may have been wilful or the result of negligence. If, at any time before the master's report is filed, either party desires to submit additional testimony he should make a motion therefor before the master. If such application is made to the court, after the report is filed, it will be refused, unless a reason is shown why such evidence was not introduced before the master.² There are instances where courts have permitted the master's report to be opened for the purpose of allowing counsel to offer additional evidence, but it was where the evidence was clearly shown to be material, the failure to offer it shown clearly to have been the result of inadvertence and oversight, and the master in his discretion had thought it just to open it.³ A referee may in his discretion refuse to open a reference to receive additional evidence offered after the close of the reference;⁴ but, in the exercise of a sound discretion, a master or referee may open up a case after it is closed for the purpose of allowing a party to put in further testimony, and such discretion will not be interfered with unless in case of gross abuse.⁵ In Georgia it has been held that a master has the right to open his report any time before it is returned into court, upon notice to parties, for the purpose of hearing further evidence.⁶ The reopening of a case heard by a master, for the purpose of introducing additional evidence, after the argument is closed and a draft of the report has been submitted to counsel, is within the sound discretion of the master, and his action will not be disturbed by the court unless there appears to have been an abuse of such discretion.⁷

Where a master prepares a draft of his report, after the hearing before him, and submits the same to the solicitors in order that they may file exceptions thereto, if they so desire,

¹ 7 Ves. 587.

⁵ *Marziou v. Pioche*, 10 Cal. 545.

² *Whiteside v. Pullian*, 25 Ill. 285.

See also *Morss v. Union Form Co.*, 39 Fed. 468.

³ *Central Trust Co. v. Marietta & N. G. Ry. Co.* (U. S. C. Ct. N. D. Ga.), 75 Fed. 41.

⁶ *Heavner v. Saeger*, 79 Ga. 471, 472, 4 S. E. 767.

⁴ *Maas v. McEntegart*, 47 N. Y. Supp. 673, 21 Misc. 462.

⁷ *Central Trust Co. v. Richmond & D. R. Co.*, 69 Fed. 761.

and a party then discovers that, by inadvertence, he has failed to offer testimony within his power, it is within the discretion of the master to reopen the case and hear the evidence. At that stage of the case the matter is still within his control, and the question of hearing further evidence within his discretion, and the court will not interfere with such discretion unless it has been abused. If he believes that, under the facts, it was his duty to reopen the case, the court will not interfere with him in so doing.¹ But in any event, where a party complains that he was not permitted to make his proofs before the master, he must show that he made proper application to the master at a proper time and that opportunity to make such proof was denied him. Thus a defendant, in an action to foreclose a trust deed, referred by an order requiring the referee to take proof of all the material allegations in the bill and report, cannot complain that he had no opportunity to take proof of the allegations of the answer, where he made no request therefor.² After both parties have introduced their evidence before the master, presented their arguments and the master has prepared and submitted to counsel a draft of his report, a motion for leave to reopen the cause to enable a party to introduce evidence upon a theory wholly different from that upon which the case has been tried, comes too late and is properly overruled.³ The court in this case say: "It has been held by this court that after the master has heard evidence, argument, and taken the matter under consideration, it is too late to amend. So, it will certainly be too late after the report of the special master has been prepared, and drafts of it served on counsel."

§ 277. The answer as evidence.—A question arises whether the heading of this section is proper, that is, whether a sworn answer can be considered as evidence, or simply a pleading having the effect of evidence, but Chief Justice Marshall and Judge Story both call a sworn answer "evidence," and so is the ordinary term applied to it;⁴ but in strictness, perhaps it is not evidence, but rather a portion of the pleadings.

¹ *Central Trust Co. of New York v. N. G. Ry. Co.* (U. S. C. C. N. D. C. Richmond & D. R. Co., 69 Fed. 761. 78 Fed. 41.

² *Abbott v. Stone*, 70 Ill. App. 671. ⁴ *Russell v. Clark*, 7 Cranch (11 U. S.) 69, 92; *Cushman v. Ryan*, 1 St. 91, Fed. Cas. 8,515; *Gould v. Gould*, Story, 516, Fed. Cas. 5,637.

³ *Central Trust Co. v. Marietta & 91, Fed. Cas. 8,515; Gould v. Gould*, Story, 516, Fed. Cas. 5,637.

rather a bar in the nature of a plea, and stands till overcome by more than one witness.¹ It has even been held, and is so stated by Daniell, that the answer of a defendant in a chancery case cannot be considered unless it was read in evidence before the master;² but, be this as it may, we come now to consider the effect of a sworn answer when called for under oath. Where the bill waives answer on oath, the answer of the defendant is but a pleading, and, like the bill itself, has no effect whatever, but a wholly different rule prevails where a defendant answers under oath. In the latter case the answer is not only evidence on the part of the defendant, but, so far as it is responsive to the bill, it must be overcome by the testimony of two witnesses, or one witness with corroborating circumstances. This is the universal rule.³

The two witnesses must not be complainants;⁴ and, in such case, husband and wife are considered but one witness.⁵ The fact that the defense set up is improbable does not change the rule.⁶ In order that the defendant's answer under oath may have such effect it is not necessary that it should answer the allegations of the bill in detail, but a mere general denial is sufficient to bring the case within the rule;⁷ but a denial "on information and belief," or "on information received," will not.⁸ Where an answer is called for under oath and the defendant answers upon information and belief, such answer is not evidence in his favor, though its allegations are responsive to the bill.⁹ The rule is laid down by Judge Story thus: "When an answer is traversed and the case set down for hearing on bill, answer and traverse, the averments in the answer will only be taken as proof so far as they are responsive to the bill." Story,

¹ *Jewett v. Cunard*, 8 Woodb. & M. Crombie v. Order of Solon, 157 Pa. 377, Fed. Cas. 7,810. St. 588, 27 Atl. 710.

² *Mahone v. Williams*, 89 Ala. 202, 224; 2 *Daniell*, Ch. Pr. (6th ed.) 1318, 447.

citing *Rands v. Pushman*, 6 Sim. 46.

³ *Horton's Appeal*, 22 Pa. St. 67; *Greenlee v. Greenlee*, 13 Pa. St. 225; *Paul v. Carver*, 24 Pa. St. 207, 64 Am. Dec. 649; *Hassler v. Bitting*, 40 Pa. St. 68; *Slemmer's Appeal*, 58 Pa. St. 155; *Eaton's Appeal*, 66 Pa. St. 483; *Nulton's Appeal*, 103 Pa. St. 286;

⁴ *Campbell v. Patterson*, 95 Pa. St. 447.

⁵ *Sower v. Weaver*, 78 Pa. St. 447.

⁶ *Hartley's Appeal*, 103 Pa. St. 28.

⁷ *Audenreid's Appeal*, 89 Pa. St. 114;

Campbell v. Patterson, 95 Pa. St. 447.

⁸ *Baughner v. Conn*, 1 C. C. (Pa.) 184;

Socher's Appeal, 104 Pa. St. 609;

McCullough v. Barr, 29 W. N. C. 123;

Riegel v. Insurance Co., 31 W. N. C. 533.

⁹ *Eaton's Appeal*, 66 Pa. St. 483, 490.

His statement of the rule is in accordance with other text-writers, and is supported by authority. The bill, however, is only evidence in behalf of the plaintiff. If responsive to the bill, it often becomes a part of the case. When matters set out in the answer are not responsive, they amount to new and independent matters, raising a new question. For a case where the bill is responsive and the authorities collected and cited, see *Wright v. Wright*, 100 Pa. St. 490.

Where no replication is filed, and the answer is responsive to the bill and answer alone, the only question is as to its effect. The bill is true, whether the averments of the bill are true, or independent matters are true.

Masters in taking the testimony.—The rule upon the admission of the evidence and reporting conclusions thereon, lies the evidence is such as is legal and proper. To hold that everything *offered* must be admitted, is to say that the master or court, on the hearing, to say that, upon every objection to the competency of the evidence, the master can only note the objection to the court for determination. It is not in the power of an unscrupulous master to do this during the investigation.

Illinois, however, say that the master, when made to take proofs, does not pass upon the competency of testimony. He merely reports the facts made, and leaves their validity to the court.

¹ And, in another Illinois case, it is said that the master

J. Eq. ² See *Eaton's Appeal*, 66 Pa. St. 490-493.
Eyck, 490-493.

ian v. ³ *Russell's Appeal*, 34 Pa. St. 281.
Hart, *Thomas v. Ellmaker*, 1 Pa. 98; *Craig v. Craig's Estate*, 36 Leg. Int. 84.

ngton, ⁴ *Mazet v. City*, 137 Pa. St. 548.

⁵ *Russell's Appeal*, 34 Pa. St. 281.
⁶ *Brewster's Eq. Pr. of Pa.*, § 5984.

e, 329; ⁷ *Achilles et al. v. Achilles*, 137 Pa. St. 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

said that upon a reference to take and report proof, either party can introduce such evidence as he may choose, and it may be oral, depositions, or documentary.¹ Evidently all that the court meant to say was that when a case is referred to a master solely to take the proofs and report the same to the court and not to report conclusions thereon, his duty, like that of a notary in taking a deposition, is to note objections to evidence, and allow the court to pass upon the same. If more than this was meant, then the above remarks were certainly inadvertently made. Hoffman, speaking of the practice of the master's office as it existed prior to the abolishing of the court of chancery in the state of New York, says: "It has also been the invariable practice in our state for the master to exercise the right of admitting or rejecting witnesses proposed, and of overruling questions;" and further adds that by this method, the objection can be taken and argued at once, as upon a trial at *nisi prius*, and that it "has become the uniform practice to contest all questions upon the admission of evidence, before the master, and for him to decide them."²

§ 279. **Rulings of masters in taking testimony** — Continued. This matter is frequently provided for expressly by statute or rule of court. For example, in Alabama it is provided by the code, section 745, that either party may except in writing to any ruling upon a reference and thus reserve the question for the chancellor, "but the statement of the name of a witness and the page on which his testimony is, in all cases, is sufficient to call such testimony to the attention of the chancellor;" and in the same state it is provided by Chancery Rule No. 89 that: "Exceptions to rulings of the register on testimony, admitted or rejected by him, must be noted by him; and if not so taken, the exception is waived." In New Jersey, prior to 1883, parties were not permitted to raise the question of the competency of witnesses or the relevancy of testimony before a master.³ Before that time his office was a naked ministerial one, but by Rule 198, promulgated by Chancellor Runyon in that year, his office was converted into a judicial one, *pro hac vice*. Prior to this the duty of the master in taking testimony

¹ Grob v. Cushman, 45 Ill. 119, 125.

² Rusling v. Bray, 37 N. J. Eq.

³ Hoffman, Masters in Chancery, 174.

consisted in taking down the questions and answers, and noting objections thereto, it being the province of the chancellor to pass upon such objections.¹ Under the present practice the master may reject an incompetent witness,² and a party failing to object waives his right to exclude the evidence; but the court, of its own motion, may do so.

So, too, the circuit and superior courts at Chicago are provided by rule that when a reference is made to take an account and report the same, or to take testimony and report with his conclusions thereon, "the master shall have power and discretion to pass upon all questions of competency of witnesses, and the propriety and relevancy of all questions propounded by counsel, and the master shall note his ruling upon every objection in the minutes of the proceedings before him." It has been held that, under United States Equity Rules, the admission or rejection of evidence rests in the discretion of the master.³

In Pennsylvania it is provided by supreme court rule that a referee shall have power to pass upon the admission or rejection of evidence, and seal bills of exceptions and appeals from his rulings upon the same;⁴ and in Arkansas it is provided by statute that the master shall have power to rule on the competency of witnesses, and the admission and exclusion of evidence, and that he shall state exceptions thereto in his report. But, independently of any rule of court or statute, a master has such power. He does not sit as an examiner, but has the right and it is his duty to confine the testimony to the issues formed by the pleadings. Yet, where there is a question in his mind as to the admissibility of evidence, he should state it, and consider its value in his final report.⁵

§ 280. Necessity of objections.—While it is true that a master always looks to the real substance of matters put in issue, and will disregard mere technical objections that do not touch the merits of the controversy, and which might re-

¹ *Rice v. Rice*, 47 N. J. Eq. 559.

² *Wocester v. Gumbin*.

³ *Demarest v. Vandenburg*, 89 N. J. Eq. 180.

167.

⁴ *Monfort's Adm'r v. Rowland*, 38 N. J. Eq. 181.

⁵ 1 *Brewster*, Eq. Pr.

⁷ *Sandel & Hill's Dig.*

⁸ *Rules Governing Masters in Chancery*, No. 2.

⁸ *Kohlmeyer v. Kohlmeyer*, Co. Ct. R. 609.

moved if the attention of the opposite party, or of the court, had been called to them,¹ and while it is also true that the court will not tolerate objections highly technical in character which seek to take advantage of slight discrepancies and variances not affecting the real merits of a cause,² and while chancery procedure does not, perhaps, enforce rules governing the production of testimony with the same strictness which obtains in courts of law, or visit the infraction of them with the same serious consequences that uniformly attend their non-observance in those courts, yet anything like culpable negligence or a wilful disregard of those rules meets with as little favor in a court of equity as in a court of law.³ In that court counsel must not forget that it is just as necessary to object to the exclusion of competent evidence, or to the admission of that which is incompetent, as in a court of law, with the exception that, ordinarily, the admission of incompetent evidence is no ground for error, for the reason that it will be presumed, that, in forming his conclusions, a chancellor disregarded the incompetent evidence, yet even this rule is not applied in strictness by the chancellor in reviewing the action of the master upon a reference.⁴ Hence, however erroneous the rulings of the court or master may be in taking the proofs, the right to question such rulings is waived by failure to object.⁵ Therefore the rule is universal that if no objection is made to evidence before the master the objection is waived.⁶ So, too, if a party fails to attend upon a reference he cannot afterwards object on the ground that there was error in the manner of taking the evidence.⁷ Here, as elsewhere, the favorite maxim of this court will be applied: If a party keeps silent when equity requires

¹ *Holman v. Gill*, 107 Ill. 467, 474; *Stow v. Steel*, 45 Ill. 328; *Newman v. Willitta*, 60 Ill. 519; *Beaver v. Slanker*, 94 Ill. 175.

² *Holman v. Gill*, 107 Ill. 467, 477.

³ *Id.*

⁴ See "Harmless Error," *ante*, §§ 336-338; *post*, §§ 496, 499.

⁵ *Endsley v. Johns*, 17 Ill. App. 466, 473; *Chicago, Peoria & St. L. R. Co. v. Wolf*, 127 Ill. 360, 364, 27 N. E. 78; *Powell v. McCord*, 121 Ill. 330, 335,

336, 12 N. E. 262; *Bressler v. People*, 117 Ill. 422, 8 N. E. 62; *Graham v. People*, 115 Ill. 566, 568, 4 N. E. 790; *Lake v. Brown*, 116 Ill. 83, 89, 4 N. E. 773; *South Park Com'rs v. Todd*, 113 Ill. 379, 383.

⁶ *Williams v. Thomas*, 3 N. Mex. 524; *Moshier v. Knox College*, 32 Ill. 155, 163.

⁷ *Bank v. Rose*, 2 Stroh. Eq. 90; *Kinsella v. Cahn*, 135 Ill. 203, 210.

him to speak, he cannot be allowed to speak and requires him to keep silent.¹

§ 281. *How questioned* — Objections and exceptions are a great deal of looseness prevails in the practice in the office relative to the taking and preserving of objections to the master's rulings in the progress of the hearing before him. We have already seen that the same rules governing the admissibility of evidence in court are equally applicable to a hearing before the master, "that what would be evidence in any other case will be evidence before the master." We now find that the practice governing the examination of witnesses, the admission or rejection of evidence and the taking of objections and exceptions to the rulings, and the preservation of them in the record, is the same in the master's office as in court.² It is surprising how many cases are heard on the merits by reason of imperfections in this regard, viz.: a failure to show a proper ground for a ruling upon the objection, or a failure to show that the party complaining took a sufficient exception to the ruling. This case occurs in every state where the whole benefit of a writ of error is lost and the court absolutely prevented from reversing erroneous rulings made on the hearing, by reason of one or the other of these particulars; hence the importance of the subject and the necessity of technical rules governing not only upon the hearing, but, which is of equal importance, in the preparation of the record.³ An objection is a statement made to the court, or a master, during the trial, or hearing, against some offer made by a party, raising the question as to the legality of the offer, or the right of the party to do the act or thing contemplated. The objection may be made by one party and the objection made by the other party is equally valid. The objection is a question of law calling for a ruling by the court.

Questions reserved for review as to the admission or rejection of evidence may be reduced to three classes.⁴

¹ *Follansbe v. Kilbreth*, 17 Ill. 522, 529, 60 Am. Dec. 691; *Moshier v. Knox College*, 82 Ill. 155, 163; *Webb v. Alton Marine & Fire Ins. Co.*, 10 Ill. 223, 225. subject to the same rules and conditions as govern the admission of similar evidence before the court. *Daniell, Ch. Pr.* 118.

² *Rush v. French*, 25 Pac. 816.

³ In ruling upon the admission or rejection of evidence upon a reference before the master he "is subject to the same rules and conditions as govern the admission of similar evidence before the court." *Daniell, Ch. Pr.* 118.

⁴ See *Rush v. French*, 25 Pac. 816.

First. When the party objecting is overruled and takes an exception to the ruling.

Second. When the party objecting is sustained and the other side takes an exception.

Third. When the court of its own motion rules out evidence and the party deeming himself aggrieved thereby excepts to such ruling.

The function of an *objection* is to challenge the legality of the matter objected to and to procure a ruling thereon by the master, or the trial court, as the case may be, while the office of an *exception* is to register the disapproval of the ruling of the party excepting, and to notify the opposite party that the matter will be contested on appeal, and thus give him the opportunity to concede the error and thereby avoid future contest over the point, or to strengthen his hold by amendment or by offering further testimony, if it can be done. An objection to save the point must always be followed by an exception, but an exception need not always be preceded by an objection. For example, if it is desired to challenge an offer made by the opposite party it is done by an objection, and to the ruling on this objection, if not sustained, he takes an exception if he desires to save the point to be thereafter contested; but, where the court's ruling is adverse to his own motion or offer and he desires to save the question to be thereafter contested, he simply excepts to the ruling, which exception, of course, is not preceded by an objection on his part. Precisely the same rules apply in the taking of testimony upon hearings before the master as in trials in court. Objections must be made and exceptions taken at the same time and in the same way.¹

§ 282. Time to object.— Objection must be made at the time because, if not then made, it deprives the opposite party of his right to "obviate the objection" either by receding from his position, or by the substitution or production of other evidence which may be in his power.² Not to object at the

¹Hamilton v. Southern, etc. Mining Co., 18 Sawyer, 118, 38 Fed. 562, 567; Troy Iron and Nail Factory v. Corning, 6 Blatchf. 328, 332, Fed. Cas. 14,196. As to whether exceptions are necessary in chancery cases see *post*, § 287.

²Hurlbut v. Hall, 39 Neb. 889, 58 N. W. 538; Storms v. Lemon, 7 Ind. App. 435; Morissey v. People, 11

proper time is just as futile as not to object at all.¹ This means, for example, that a question must be objected to before it is answered and not after.² A party is not permitted to wait by and speculate as to what the witness' answer will be and then object to the competency of the witness or to the form or substance of the testimony.³ He cannot thus "play fast and loose," but, if he takes the answer of the witness, he waives the right of objection, and his motion to strike out the answer will be overruled.⁴ This rule does not hold good when a party is prevented from making his objection at the proper time, as when the question indicates the subject-matter but the answer is not responsive to it.⁵ So where the grounds of a valid objection are not known to a party, but are first disclosed upon cross-examination, a motion to strike out the answer will be sustained.⁶ The evidence, being apparently competent when given, proving afterward to be incompetent, a motion to exclude will be sustained; for example, parol testimony being given as to the terms of a contract will be excluded on motion if it turns out later, in cross-examination, that the contract was in writing.⁷ But, if the ground of objection is known at the time the incompetent evidence is offered, it must be then objected to. Thus, if a copy of a written instrument is offered and admitted in evidence, a party will not be permitted afterward to object. Not to then object is to deprive the party of his right to produce the original or prove its loss and thus to waive the objection. It would simply be permitting a party

Mich. 327; *Bennett v. Clemence*, 6 Allen (Mass.), 10; *Com. v. Hogan*, 11 Gray (Mass.), 312; *Central R. Co. v. Allmon*, 147 Ill. 471, 35 N. E. 725; *State v. Maher*, 74 Iowa, 82, 37 N. W. 2; *Hanson v. Milwaukee Mechanics' Mut. Ins. Co.*, 45 Wis. 321; *Brown v. Owen*, 94 Ind. 31; *McLaughlin v. Hinds*, 151 Ill. 408, 407, 38 N. E. 136; *Harris v. Shebek*, 151 Ill. 287, 292, 37 N. E. 1015; *St. Clair County, etc. v. Fietsam*, 97 Ill. 474, 480; *C. & A. R. R. Co. v. Byrum*, 153 Ill. 131, 134, 38 N. E. 578; *Kinsella v. Cahn*, 185 Ill. 208, 210, 58 N. E. 1119.

¹ *Bohanan v. Hans*, 26 Tex. 445, 450.

² *Morrissey v. People*, 11 Mich. 327,

333; *Hurlbut v. Hall*, 39 Neb. 889, 58 N. W. 538.

³ *Quin v. Lloyd*, 41 N. Y. 349, 350; *Sheridan v. Medara*, 10 N. J. Eq. 475.

⁴ *Storms v. Lemon*, 7 Ind. 435, 440; *Brown v. Owen*, 94 Ind. 31; *Bingham v. Walk*, 128 Ind. 164, 27 N. E. 433; *Newlon v. Tynar*, Ind. 466, 469, 27 N. E. 163.

⁵ *Storms v. Lemon*, 7 Ind. 435, 440.

⁶ *Hatch v. Pryor*, 42 N. Y. (3 Key) 441, 443; *Dunn v. Hewitt*, 2 Den. 637; *Southwick v. Hayden*, 7 Cow. 334.

⁷ *Quin v. Lloyd*, 41 N. Y. 349, 350.

set a trap for his opponent to allow him to afterward interpose such objection.¹ Such things may do in love and in war, where, it is said, all things are fair, but life is too short to transact business on such a system in courts of justice.² If an improper answer is given to a proper question the proper remedy is a motion to exclude the answer, and not by objection or exception.³ The right of the parties to be protected against improper evidence is mutual. All that is required is that the party complaining state a proper objection, secure a ruling thereon, and if the judge or master, by such ruling, refuses to exclude when objection is made, or excludes when the objection made is not proper, and take a proper exception to such ruling, in which event relief will be granted on review if such ruling be erroneous.⁴

§ 283. Objections must be specific.—Not only must objections to evidence be made in apt time, but the party objecting is required to state specifically the grounds of such objection. This rule is an important one, and is strictly enforced. To answer its requirements two things are necessary:

First. Whatever is objected to must be clearly and definitely pointed out, so that the opposite party and the court may know what it is that is claimed to be objectionable.⁵

Second. That the ground of the objection be specifically stated.⁶

The reasons for these requirements show that they are not technical but are established in the interest of justice and right. They are:

First. To enable the court to pass intelligently upon the matter.

Second. To give the opposite party an opportunity to avoid the objection by amendment, offering other evidence, or by withdrawing the objectionable matter entirely.⁷

¹ Bohanan v. Hans, 26 Tex. 446, 451.

² Rush v. French, 1 Ariz. 99, 123, 25 Pac. 816.

³ State v. Marsh, 70 Vt. 288, 298, 40 Atl. 836, and many cases there cited.

⁴ Rush v. French, 1 Ariz. 99, 123, 25 Pac. 816.

⁵ Cunningham v. Cochran, 18 Ala. 479, 490, 52 Am. Dec. 280; Hamilton

v. Southern, etc. Mining Co., 18 Sawyer, 118, 88 Fed. 562, 567. The same rule holds good as to exceptions to rulings of the court. *Post*, §§ 456-461.

⁶ Hamilton v. Southern, etc. Mining Co., 18 Sawyer, 118, 88 Fed. 562, 567.

⁷ Murchie v. Peck Bros. & Co., 160 Ill. 175, 178, 48 N. E. 856; Lake Shore,

The rule requiring the party objecting to state the grounds of his objection is, for the reasons statutory one, and, unless complied with, such objection is but fair to the court or master that the matter of and the ground of objection should be clearly stated, so that an intelligent ruling can be made upon the point. A result can be obtained by a general objection that is irrelevant or incompetent.¹ A party wishing the remedy must, at the time he complains, show the ground of his objection; in the language of the old authorities, he must put his finger on the point of the objection.² The authorities on this point are all one way. Objections to the admission of evidence must be of such a specific character as to distinctly state the grounds upon which the party relies, so that the other side has full opportunity to obviate them at the time, or under any circumstances that can be done.³ The rule is universal, but when the ground of objection is remote,

etc. Ry. Co. v. Ward, 135 Ill. 511, 516, 26 N. E. 520; *Ohio, etc. Ry. Co. v. Walker*, 118 Ind. 196, 200, 15 N. E. 284, 3 Am. St. 638; *Harris v. Shebek*, 151 Ill. 287, 292, 37 N. E. 1015; *Libby, McNeill & Libby v. Scherman*, 146 Ill. 540, 549, 34 N. E. 801, 37 Am. St. 191; *Bohanan v. Hana*, 26 Tex. 445, 450; *Noonan v. Caledonia Mining Co.*, 121 U. S. 393, 400, 7 Sup. Ct. R. 911.

¹*Columbus Safe Deposit Co. v. Burke*, 60 U. S. App. 263, 262; *Camden v. Doremus*, 8 How. (U. S.) 515, 530; *Burton v. Driggs*, 20 Wall. 125, 133; *North Chicago Street Ry. Co. v. St. John*, 57 U. S. App. 366; *Noonan v. Caledonia Mining Co.*, 121 U. S. 393, 400, 7 Sup. Ct. R. 911; *Charleston Ice Mfg. Co. v. Joyce*, 8 U. S. App. 809, 811; *Wood v. Weimar*, 104 U. S. 786; *Hinde v. Longworth*, 24 U. S. (11 Wheat.) 199, 209; *United States v. Breitling*, 61 U. S. (20 How.) 252, 254; *United States v. Shapleigh*, 13 U. S. App. 26, 46; *Whitman v. Foley*, 125 N. Y. 651, 660, 26 N. E. 725; *Cunningham v. Cochran*, 18 Ala. 479,

480; *Louisville, etc. Ry. Co. v. Louisville, etc. v. Fettig*, 138 N. E. 407; *People v. Nelson*, 421, 428, 24 Pac. 1006; *Chaffee*, 88 Mich. 256, 47; *Smith v. McCarthy*, 83 Ill. 1; *Christian v. State*, 86 G. E. 645; *St. Louis S. W. Henson*, 58 Fed. 531; *Harmon v. Wall*, 323, 339; *Stebbins*, 108 U. S. 32, 46, 3 Sup. Ct. R. 216, 221, 4 Sup. Ct. R. 216.

²*Rush v. French*, 1 U. S. 25 Pac. 816, citing 2 U. S. 529; *Martin v. Traversa*, 245; *Frier v. Jackson*, 8 U. S. App. 1; *Jackson v. Cadwell*, 1 U. S. App. 1; *Whiteside v. Jackson*, 1 U. S. App. 1; *Waters v. Gilbert*, 2 U. S. App. 1; *Tanner v. Tanner*, 7 Cal. 38.

³*Noonan v. Caledonia Mining Co.*, 121 U. S. 393, 400, 7 Sup. Ct. R. 911; *Camden v. Doremus*, 8 How. (U. S.) 515, 530; *Rush v. French*, 1 U. S. 25 Pac. 816; *City of Lowell v. Lowery*, 74 Ind. 530, 532.

amendment or otherwise, the objection must be specific.¹ For example, a general objection is not enough to raise the point that a question is leading.² So a general objection on the ground of "incompetency," "immateriality," or "irrelevancy," is not broad enough to question the competency of the witness;³ or the validity of an instrument offered in evidence.⁴ As to the distinction between "immaterial" and "incompetent" see *People v. Manning*.⁵ Such an objection amounts to no more than to say "We object."⁶

"The object of requiring the grounds of objection to be stated, which may seem to be a technicality, is really to avoid technicalities and prevent delay in the administration of justice. When evidence is offered to which there is some objection, substantial justice requires that the objection be specified, so that the party offering the objection can remove it, if possible, and let the case be tried on its merits."⁷ If a party interposes an objection without stating the ground upon which it is based, it will be considered as groundless.⁸ "An objection that cannot be specifically stated is not worth the making," and if the grounds are not so stated "it is fair to presume that none exists."⁹

The only instance in which a general objection will be held good "is in those exceedingly rare cases where it is apparent

¹ *Harris v. Shebek*, 151 Ill. 287, 292, 37 N. E. 1015; *McLaughlin v. Hinds*, 151 Ill. 403, 407, 38 N. E. 136; *C. & A. R. R. Co. v. Byrum*, 153 Ill. 181, 184, 38 N. E. 578; *Murchie v. Peck Bros. & Co.*, 160 Ill. 175, 178, 43 N. E. 356; *Owen v. Frink*, 24 Cal. 171, 177; *Williamson v. Rexroat*, 55 Ill. App. 116; *Pittsburgh, etc. Ry. Co. v. Lyons*, 159 Ill. 576, 43 N. E. 377; *Harmison v. City of Lewistown*, 153 Ill. 813, 317, 38 N. E. 628, 46 Am. St. 893.

² *Edmanson v. Andrews & Co.*, 85 Ill. App. 223, 224; *First Nat. Bank v. Dunbar*, 118 Ill. 625, 9 N. E. 186; *Hanson v. Milwaukee, etc. Ins. Co.*, 45 Wis. 321; *Kansas Pac. R. R. Co. v. Pointer*, 9 Kan. 620, 627.

³ *Brigham v. Walk*, 128 Ind. 164, 37 N. E. 483.

⁴ *Pittsburgh, etc. Ry. Co. v. Lyons*, 159 Ill. 576, 43 N. E. 377.

⁵ 48 Cal. 335, 338.

⁶ *Ohio, etc. Ry. Co. v. Walker*, 113 Ind. 196, 200, 15 N. E. 234, 3 Am. St. 638.

⁷ *Rush v. French*, 1 Ariz. 99, 124, 25 Pac. 816.

⁸ *Evanston v. Gunn*, 99 U. S. 660, 665; *Toplitz v. Hedden*, 146 U. S. 252, 255, 13 Sup. Ct. R. 70; *Ohio, etc. Ry. Co. v. Walker*, 113 Ind. 196, 200, 15 N. E. 234, 3 Am. St. 638; *Bennett v. Gibbons*, 55 Conn. 450, 453; *People v. Manning*, 48 Cal. 335, 338; *Kansas Pacific R. R. Co. v. Pointer*, 9 Kan. 620, 627.

⁹ *Ohio, etc. Ry. Co. v. Walker*, 113 Ind. 196, 200, 15 N. E. 234, 3 Am. St. 638.

on the face of the proposition that it is impossible that it is or can be made available for any purpose. As the law requiring a specific objection is to enable the other party to obviate it if possible, if the objection is apparent, and that the defect cannot possibly be obviated, a specific objection would not help the adverse party, and in such case a general objection would be sufficient. But of course such cases are very rare, and a prudent practitioner will hardly point on a general objection."¹ A general objection is "irrelevant, incompetent and immaterial" and is sufficient, unless the evidence is inadmissible for any purpose. If evidence objected to is clearly inadmissible for any purpose, and if it further appears that it is not in the power of the party offering it to remedy the defect, a general objection is sufficient.² This is on the principle that when the rule ceases so does the rule itself — *Cessante ratione ipsa lex*. Such an objection made before a master is not sufficiently specific to be entitled to any weight, for the party offering the evidence is entitled to have a particular portion of the evidence objected to pointing out the specific ground of objection stated, in order to obviate the objection.⁴ So, too, the words "incompetent and irrelevant" are insufficient;⁵ and an objection that evidence is "inadmissible" means no more than to say that it is and such an objection should be overruled.⁶ All such

¹ *Rush v. French*, 1 Ariz. 99, 125, 25 Pac. 816; and large number of cases cited in the opinion.

² *Columbus Safe Deposit Co. v. Burke*, 60 U. S. App. 253, 262; *United States v. McMaisters*, 71 U. S. (4 Wall.) 680, 682; *Noonan v. Caledonia Mining Co.*, 121 U. S. 393, 400, 7 Sup. Ct. R. 911; *Wood v. Weimar*, 104 U. S. 786, 795; *New York Electric Equipment Co. v. Blair*, 51 U. S. App. 81, 86, 187; *Lake Erie, etc. Ry. Co. v. Parker*, 94 Ind. 91, 98; *Charleston Mfg. Ice Co. v. Joyce*, 8 U. S. App. 809, 811, 812; *Louisville, etc. Ry. Co. v. Falvey*, 104 Ind. 409, 415; *Leet v. Wilson*, 24 Cal. 598; *Cornell v. Barnes*, 26 Wis. 473, 480; *Camden v.*

Doremus, 8 How. (U. S.) 1; *People v. Frank*, 28 Cal. 489; *Owen v. Frink*, 24 Cal. 554, 558; *North Cal. St. R. R. Co. v. Satter*, 57 U. S. App. 866; *Satter v. Cochran*, 36 Cal. 489, 541; *Cochran v. Satter*, 34 Cal. 554, 558.

³ *Cunningham's Ex'r*, 18 Ala. 479, 180, 52 A. 1; *Davis v. The State*, 17 Ala. 1.

⁴ *Hamilton v. Southern Ry. Co.*, 18 Sawyer, 118; *Dreux v. Domeo*, 1 Brantley v. Gunn, 29 A. 1.

⁵ *Sneed v. Osborn*, 25 Voorman v. Voight, 46

⁶ *Leet v. Wilson*, 24 Cal.

viz., "incompetent," "immaterial," or "improper," are too general and will not be recognized.¹

§ 284. **Objection must not be too broad.**—A general objection leveled at a mass of testimony covering several particulars, some portions of which are legal, will be overruled if any portion is proper.² The party objecting knows what portion he considers objectionable, and fairness to the court and opposite party requires that he should point it out, and if he does not he cannot complain if the court overrules his objection.³ This rule is not technical, but is founded in the interest of justice. It is the same rule that is applied to exceptions to a charge to a jury. A general exception to an entire charge is futile if it contains any correct and pertinent statement of law. So a general exception to the refusal of a series of instructions is futile if any one of them is erroneous, and for the same reason a general exception to the giving of a series of instructions will be overruled if any one of them is good.⁴

¹ *Evansville, etc. R. R. Co. v. Fettig*, 180 Ind. 61, 62, 29 N. E. 407, and cases there cited; *Ohio, etc. Ry. Co. v. Walker*, 113 Ind. 196, 200, 15 N. E. 234, 3 Am. St. 638.

² *Murrah v. Branch Bank*, 20 Ala. 392, 398; *Melton v. Troutman*, 15 Ala. 535; *Smith v. Zaner*, 4 Ala. 99, 105; *Gibson v. Hatchett*, 24 Ala. 201; *Brantley v. Gunn*, 29 Ala. 387, 392; *Elliott v. Peirsol*, 1 Pet. (U. S.) 328, 338; *Enright v. Amsden*, 70 Vt. 183, 40 Atl. 37.

³ *Pettigrew v. Barnum*, 11 Md. 484; *Beebe v. Bull*, 12 Wend. 504, 37 Am. Dec. 150; *Wallace v. Randall*, 81 N. Y. 164, 170; *Smoot v. Eslava*, 23 Ala. 659, 661, 58 Am. Dec. 810; *City of Terre Haute v. Hudnut*, 112 Ind. 542, 549, 16 N. E. 686; *Jones v. State*, 118 Ind. 39, 20 N. E. 634; *Richmond & D. R. R. Co. v. Jones*, 93 Ala. 218, 225, 9 So. 276; *Holmes v. Turner's Falls Co.*, 150 Mass. 535, 23 N. E. 305, 6 L. R. A. 288; *Hammond v. Schiff*, 100 N. C. 161, 6 S. E. 753; *Powell v. Augusta, etc. R. Co.*, 77 Ga. 192, 3 S. E. 757; *St. Louis, etc. Ry. Co. v.*

Hendricks, 48 Ark. 177, 182, 2 S. W. 783, 3 Am. St. 220; *United States v. McMasters*, 71 U. S. (4 Wall.) 680; *Moore v. Bank of Metropolis*, 18 Pet. 302.

⁴ *New Dunderberg Mining Co. v. Old*, 97 Fed. 150, 155, 38 C. C. A. 89; *Price v. Pankhurst*, 10 U. S. App. 497, 3 C. C. A. 551, 53 Fed. 312; *Masonic Benevolent Association v. Lyman*, 18 U. S. App. 507, 9 C. C. A. 104, 107, 60 Fed. 498; *St. Louis, etc. Ry. Co. v. Spencer*, 36 U. S. App. 229, 282, 18 C. C. A. 114, 116, 71 Fed. 93; *New England, etc. Co. v. Catholicon Co.*, 49 U. S. App. 78, 80, 24 C. C. A. 595, 79 Fed. 294; *Beaver v. Taylor*, 93 U. S. 46, 54; *Lincoln v. Claffin*, 74 U. S. (7 Wall.) 132; *Cooper v. Schlesinger*, 111 U. S. 143, 4 Sup. Ct. R. 360; *Barton v. West Jersey Ferry Co.*, 114 U. S. 474, 5 Sup. Ct. R. 960; *Rogers v. The Marshal*, 68 U. S. (1 Wall.) 644, 647; *Moulor v. American Life Ins. Co.*, 111 U. S. 335, 337, 4 Sup. Ct. R. 466; *Block v. Darling*, 140 U. S. 234, 238, 11 Sup. Ct. 832; *McClellan v. Pyeatt*, 4 U. S. App. 319; *Haward v.*

This rule applies to depositions as well. If any portion is admissible and a part admissible, a general objection to the whole will be overruled. "It is impractical, if not impossible, to take depositions so that every question and answer in the deposition and every exhibit attached to them will pass the scrutiny of the court after astute counsel have had an opportunity to study and prepare objections to them, and a practice which would exclude all the admissible evidence in a deposition because it contains some irrelevant, incompetent or immaterial matter would practically destroy the value of depositions, vastly increase the expense of litigation, and intolerably delay the administration of justice."¹

There is, however, a well recognized exception to this rule requiring the party objecting to a mass of testimony to point out the portions which he considers objectionable. The authorities which require an exception to point out the illegal part of an aggregate which is in part legal has no application to a case where the legal and illegal portions are so commingled that the exceptant has no means of distinguishing one from the other.² "A case occasionally arises in which the proponent offers a great mass of evidence which does not on its face appear to have any relevancy to the issues on trial, and in which he does not call the attention of the court to any part of the mass which is admissible, and does not state the purpose of the offer, where a general objection is very properly sustained. The party offering a mass of testimony the materiality of which is not apparent is required to point out its relevancy or materiality and the object or purpose of its introduction, and upon his failure to do so he will not be heard to complain that an objection interposed to his offer is defective in not pointing out specific portions claimed to be improper. "A party cannot ambush the court and his adversary in such a way. When the grounds of an objection are specified, such specification is exclusive, and all grounds not specified are waived."

Cotton, 1 Ill. App. 577, 583, and cases cited; Harvey v. Tyler, 69 U. S. (2 Wall.) 328; Beckwith v. Bean, 98 U. S. 268, 284.

¹ First National Bank v. Rush, 56 U. S. App. 556, 562, and cases cited.

² Pearson v. Darrington, 32 U. S. 227, 241, and cases cited.

³ First National Bank v. Rush, 56 U. S. App. 556, 562; German Insurance Co. v. Frederick, 19 U. S. App. 24, 32.

⁴ German Insurance Co. v. Frederick, 19 U. S. App. 24, 32, 34.

This is but an application of the maxim: *Expressio unius est exclusio alterius*.¹ The court on appeal, and also a chancellor when reviewing a master's rulings, will hold the party to his objection as made on the hearing. Counsel will not be permitted to "strike between wind and water on the trial, and then go home to their books to study out other objections," to be urged before the reviewing tribunal, but "they must stand or fall upon the case as made, because the reviewing tribunal is not a forum to discuss new points, but its duty is simply to determine whether the rulings on the hearing, on the objections as then made, were correct or not."² It sometimes happens that objections made before the master are deficient in not stating the ground of objection, or are too general in character, and are rightly overruled, yet counsel, in the exceptions to the report, attempts to mend his hold by making his exception more specific. This is analogous to an effort on part of counsel in the court of appeals to make a good objection, in his assignment of errors, when the record shows that the actual objection interposed on the hearing was based on a different ground, or was otherwise deficient. This cannot be sanctioned, but he must abide by his objection as made at the time. As he makes his bed so he must lie.³ The ground of an objection cannot be kept back at the trial and afterward urged when it is too late to correct the alleged error.⁴ A party is not permitted

¹ *Hamilton v. Southern, etc. Mining Co.*, 83 Fed. 562, 566, 18 Sawyer, 113; *Evanston v. Gunn*, 99 U. S. 660, 665; *Belk v. Meagher*, 104 U. S. 279; *Fischer v. Neil*, 6 Fed. 89; *Wood v. Weimar*, 104 U. S. 786, 795; *Camden v. Doremus*, 44 U. S. (8 How.) 515, 530; *Burton v. Driggs*, 87 U. S. (20 Wall.) 125, 133; *Hanson v. Milwaukee, etc. Ins. Co.*, 45 Wis. 321, 323; *St. Louis S. W. Ry. Co. v. Henson*, 58 Fed. 531, 7 C. C. A. 349; *State v. Neakes*, 70 Vt. 247, 257, 40 Atl. 249; *Foster's Ex'rs v. Dickerson*, 64 Vt. 253, 246, 24 Atl. 263.

² *Rush v. French*, 1 Ariz. 99, 125, 25 Pac. 816.

³ *Burton v. Driggs*, 87 U. S. (20 Wall.) 125, 133; *Hinde's Lessee v. Longworth*, 24 U. S. (11 Wheat.) 199;

Wood v. Weimar, 104 U. S. 786, 795; *Charleston Ice Mfg. Co. v. Joyce*, 8 U. S. App. 309, 311; *Hanson v. Milwaukee, etc. Ins. Co.*, 45 Wis. 321; *Bingham v. Walk*, 128 Ind. 164, 178, 27 N. E. 483; *Ohio, etc. R. R. Co. v. Walker*, 113 Ind. 196, 15 N. E. 234, 3 Am. St. 638; *North Chi. St. R. R. Co. v. St. John*, 57 U. S. App. 866; *Fitzpatrick v. Papa*, 89 Ind. 17; *Wrigley v. Cornelius*, 163 Ill. 92, 44 N. E. 406; *Chi. & E. I. R. R. Co. v. People*, 120 Ill. 667, 671-2, 12 N. E. 207; *St. L. etc. Ry. Co. v. Eggman*, 161 Ill. 155, 43 N. E. 620.

⁴ *Com. v. Hogan*, 11 Gray (Mass.), 312; *Coffeen, etc. Coal Co. v. Barry*, 56 Ill. App. 587; *Continental, etc. Loan Society v. Schubnell*, 63 Ill. App. 379.

to fish for a favorable ruling on the hearing and at the same time disclose his objection before the reviewing trial judge.

§ 285. Useless objections to be avoided.— Good practice to the court and to the opposite party, requires that counsel should avoid making useless objections in the preliminary hearing. Such objections, repeatedly made with the intention of relying upon them, are calculated not only to interfere with the orderly proceeding, but, also, are calculated to prejudice the court or master against the party making them. A party should only interpose an objection when the advice of counsel there is good ground for the same. If there is a doubt, counsel should be on the safe side. Counsel should avoid repetition of the mere words "I object" or "Objected to," without giving a reason, as they accomplish nothing.¹ Such objections are, therefore, worse than useless because, as above stated, if a party, at the time an objection is offered, simply "objects," without stating the grounds of the objection, he will not be permitted afterward to state the grounds which will make it good.² In *North Chi. St. R. v. John*, 57 U. S. App. 366, in more than one hundred instances an objection was made, overruled and exceptions taken to the question and sometimes to the answer, sometimes to the overruling of a motion to exclude evidence already admitted, but in no instance showing any reason for the objection or motion. The rulings of the court were, in every instance, necessarily sustained without any reference to the merits.⁴

Such objections should not be tolerated. It is unreasonable to expect the court, or master, to explore the whole case for certain defects which the objector either would not or could not disclose, and it would be more extraordinary still

¹ *Covillaud v. Tanner*, 7 Cal. 88.

² *United States v. Breitling*, 61 U. S. (20 How.) 252, 254; *United States v. Shapleigh*, 12 U. S. App. 28, 46; *Baker v. Newbury*, 63 Ill. App. 405; *Arcade Co. v. Allen*, 51 Ill. App. 305; *Louisville, etc. Ry. Co. v. Jones*, 108 Ind. 551, 562, 9 N. E. 478.

³ *Roberts v. Graham*, 73 U. S. (6 Wall.) 578; *Patrick v. Graham*, 132

U. S. 627, 10 Sup. Ct. R. 407; *etc. R. Co. v. O'Reilly*, 15 Sup. Ct. R. 830; *Hill v. Worth*, 24 U. S. (11 Wheat.) 477; *Wheeler v. Tyler*, 89 U. S. 100; *Burton v. Driggs*, 87 U. S. 125, 132.

⁴ See large number of cases cited in the opinion.

the mask of such an objection, a party should be permitted in the reviewing tribunal to spring upon his adversary defects which he never relied upon, and which, if they had been openly and specifically alleged, would have been easily cured.¹ This too common practice of interposing objection after objection with "a great flourish of trumpets" in the trial court, at the same time stating nothing specific which the court can lay hold of and rule intelligently upon, is condemned by Judge Shipman of the United States court of appeals, who, commenting upon an objection of this character, says: "The alleged error is a specimen of practice not to be encouraged, which is to object with a rattle of words that conceal the real nature of the objection, capable of being removed upon the spot, and to announce its true character for the first time in the appellate court."² "A party cannot ambush the court and his adversary in such a way."³

§ 286. Master should rule on objections.— After making an objection the party should insist upon a ruling upon the same, as there is nothing for a reviewing court to pass upon, "unless an objection has been made and a ruling insisted upon at the time."⁴ The words "exception," "I take an exception to that statement," and similar expressions, followed by the remarks of the court, "Let the exception be noted," or "Note the exception," amount to nothing. They fail to show a ruling of the court.⁵ It is believed that the general practice in the master's office is to allow evidence objected to to go in "subject to objection," reserving the ruling upon the objection until the making up of the report. The impropriety of this course is apparent. If an objection is to be sustained the party whose act is thus to be declared improper has a right to know it at once, so that he can, if he chooses so to do, yield the point

¹Camden v. Doremus, 3 How. & Co. v. Leary, 187 Ill. 319, 26 N. E. 1093; North Chi. St. Ry. Co. v. Cotton, (U. S.) 515, 580.

²New York Electric Equipment Co. v. Blair, 51 U. S. App. 81, 86, 87. 140 Ill. 486, 502, 29 N. E. 899; Scott v. People, 141 Ill. 195, 30 N. E. 329; German Insurance Co. v. Frederick, 19 U. S. App. 24, 34. Boone v. People, 148 Ill. 440, 36 N. E. 99; Pike v. City of Chicago, 155 Ill.

⁴W. Chi. St. R. R. Co. v. Sullivan, 165 Ill. 302, 305, 46 N. E. 234; West Chi. St. R. R. Co. v. Annis, 165 Ill. 475, 478, 46 N. E. 264; Marder, Luse

⁵Id.

rather than take his chance of getting error into the record. Not only this, but he may be able to remove the error by amendment or by the substitution of other evidence of questioned competency. Besides, the party making the objection is "left at sea." Not knowing what the ruling will be on his objection he is at a loss to know whether to put in evidence to meet what he has objected to or to simply stand by his objection. "The parties are entitled to have such questions passed upon at the time they are raised, so that they can govern themselves in the future trial of the cause in the light and in reference to, such decision."¹ Another objection to the practice is that during a protracted hearing, hundreds of objections will be interposed to evidence as it is offered, and when the report is made up, perhaps the parties may not find anything upon a single objection, thus leaving the court, when the report comes in, wholly unable to tell what evidence was considered by the master and what was disregarded.

In a New York case *Folger, Justice*, speaking for the court in commenting upon the practice of referees of admitting evidence "subject to objection," says: "By receiving the evidence in that way, the referee followed a practice which we understand, prevails in some parts of the state, in trials before referees. It is understood and agreed between the parties that the validity of the objection is not at the moment determined. The determination of it is reserved by the referee to be made upon more mature consideration, before the delivering of his report, and his determination thereon is to be explicitly stated in his report. If he shall, after the case is submitted, overrule the objection and consider the evidence, the party objecting to it is, by this practice, to have the benefit of an exception. If, on the other hand, he sustains the objection and rejects the evidence, the party offering it is to have the benefit of an exception. Such, we say, is understood to be a practice in some parts of the state. It is not one to be commended, however; for it does not conduce to a clear and accurate trial of the action, nor to an explicit presentation of the questions for review. If the referee, on his part, shall state what he has done in admitting or rejecting the evidence

¹ *Wagener v. Finch*, 65 Barb. (N. Y.) 493, 500.

and it shall appear, without question, in the case as made up, that he has ruled and an exception has been taken to his ruling, such exception may be considered on review. But if, when evidence has been received subject to objection, he shall have afterward either sustained or overruled the objection, and there does not appear in the case any exception by the party aggrieved, it may turn out that the party has no sufficient remedy." . . . "It is possible that had a ruling been requested at the hearing, when the testimony was objected to, and it had been made, the plaintiff might have conducted the trial otherwise than he did." . . . "On the other hand, had the referee, receiving the evidence, given to it all the weight which the plaintiff claims for it, the defendant has no exception to its admission. Inasmuch, as a general rule, we are confined in our review to the errors of law which are presented by exceptions made, it is evident that such a mode of trial of actions is hazardous."¹ We submit that these criticisms of the New York courts upon a practice prevalent upon trials before referees in that state apply with equal force to hearings in the master's office. In any event, if a party means to question the legality of the master's acts in the admission of evidence against his objection, he must see that the master's minutes show what disposition is made of his objections, and if the master omits to decide upon them or decides them incorrectly, he should embrace the first opportunity to correct such omission or alleged error in this particular.² In jurisdictions where the master is required to submit a draft of his report to counsel and where errors of this character are corrected upon the coming in of the report and not by direct appeal to the chancellor, the correct course, unless the opportunity sooner occurs, is to see that the proper exceptions are taken to such draft report,³ and, in any event, the proper objections and rulings must be had before the case reaches the chancellor, in order to lay the foundation to question the correctness of the master's rulings.

§ 287. **Exceptions to rulings made by the master.**—The term "exceptions," as used in this connection, must be clearly

¹ *Sharpe v. Freeman*, 45 N. Y. 802, 804. ning, 6 Blatchf. (U. S.) 328, 332, Fed. Cas. 14,196.

² *Troy Iron & Nail Factory v. Cor-* ³ *Id.*

test the matter further before the reviewing tribunal, and then give an opportunity to confess the objection rather than take chances of getting error into the record, it follows that, to get of any benefit in this regard, the exception must be promptly taken at the time the ruling is made. Another reason for requiring an exception to be then taken is that the court may reconsider the matter and remove the ground of exception. For the reasons stated, an exception, like an objection, must be taken at the proper time, is just as futile as not to except at all.² This rule, it is said, applies with equal force to proceedings upon a hearing before a master as to a trial in court.³

§ 289. Form of exceptions.—An exception does not, like an objection, present the specific ground upon which it is based, except where an objection is unnecessary, as where a party excepts to a charge or instructions given by the court to a jury. Yet, while it is true that no particular form is required, an exception should be expressly and formally taken so the court and opposite party may understand precisely what is intended.⁴ For this reason an exception in the nature of a mere argument is unavailing, the object of an exception being to present a distinct point, in which error is claimed, and preserve it to be passed upon by the reviewing tribunal, and “unless this is done the exception amounts to nothing.”⁵ The words “exception,” or “exception by plaintiff,” are insufficient unless it clearly appears what it is that was excepted to.⁶ So the words “objected to, sustained, exception,” present no question for review.⁷ Such objections may be said to cover the whole

¹ *Harvey v. Tyler*, 69 U. S. (2 Wall.) 828, 839.

² *Walton v. United States*, 22 U. S. (9 Wheat.) 651; *United States v. Carey*, 110 U. S. 51, 8 Sup. Ct. R. 424; *Sheppard v. Wilson*, 47 U. S. (6 How.) 260, 275; *Stanton v. Embrey*, 98 U. S. 548, 555; *United States v. Breitling*, 61 U. S. (20 How.) 252, 254; *Burns v. People*, 126 Ill. 282, 286, 18 N. E. 550; *Dickhut v. Durrell*, 11 Ill. 72, 84; *Flanningham v. Hogue*, 59 Ill. App. 815, 819.

³ *Troy Iron & Nail Factory v. Corning*, 6 Blatchf. 328, 331, Fed. Cas. 14,196.

⁴ *Thwing v. Clifford*, 136 Mass. 48; *Leavenworth v. Mills*, 6 Kan. 299.

⁵ *Alsbrook v. Watts*, 19 S. C. 564.

⁶ *Baker v. Newbury*, 63 Ill. App. 405, 407.

⁷ *Louisville, etc. Ry. Co. v. Jones*, 106 Ind. 551, 582, 9 N. E. 476, and many cases there cited. In *Arco Co. v. Allen*, 51 Ill. App. 805, Judge Gary quaintly remarks of such an exception: “Who objected to what? who sustained what? who excepted to what?”

record; hence the rule that an exception, to be of any avail, must present distinctly and specifically the ruling objected to.¹ Justice itself and fairness to the court require counsel to put his finger on the precise point excepted to, that the court may reconsider the matter and remove the ground of objection, if it can be done.² Hence it is a rule that a general exception cannot be taken to several rulings in gross, but a separate and distinct exception must be taken to each ruling as it is made.³ Not only is certainty required of the party objecting and excepting, but an equal degree of certainty is required on the part of the party offering the evidence. If he desires to preserve the matter in proper form for review, he should, where he takes an exception to the ruling of the court rejecting evidence offered, see that his offer is in such plain and unequivocal terms as to leave no room for doubt as to what is intended. If evidence is competent for one purpose and incompetent for another, he should put it on the competent ground, so the court of review can see that the court ruling thereon was not misled, otherwise he cannot be heard to complain that his offer was rejected.⁴

§ 290. **What the record must show.**— Objections, the rulings of the court thereon, and exceptions taken to such rulings, in actions at law, are preserved by a bill of exceptions, but it is not necessary that they should be reduced to writing at the time; this may be done afterward.⁵ In the federal courts, and generally in proceedings before a master, these matters are shown in his minutes duly certified to the court. It is the duty of the master to note in his minutes objections, rulings on the same and exceptions at the time the same are made or taken.⁶ This is usually done by a shorthand reporter, who

¹ *Insurance Co. v. Sea*, 88 U. S. (21 Wall.) 158, 162; *Young v. Martin*, 75 U. S. (8 Wall.) 354, 357; *Flaningham v. Hogue*, 59 Ill. App. 815; *E. St. Louis Electric Ry. Co. v. Stout*, 150 Ill. 9, 36 N. E. 968; *Same v. Cauley*, 148 Ill. 490; *Walter v. Walter*, 117 Ind. 247, 30 N. E. 148; *Johnson v. McCulloch*, 89 Ind. 270; *Dickhut v. Durrell*, 11 Ill. 73, 84.

² *Harvey v. Tyler*, 69 U. S. (2 Wall.) 328, 339.

³ *Flaningham v. Hogue*, 59 Ill. App. 815; *Johnson v. McCulloch*, 89 Ind. 270, 273.

⁴ *Daniels v. Patterson*, 8 N. Y. 47, 51; *Wilson v. Noonan*, 85 Wis. 321, 360; *Melton v. Troutman*, 15 Ala. 535, 537.

⁵ *Hunnicut v. Peyton*, 102 U. S. 333, 354; *United States v. Breitling*, 61 U. S. (20 How.) 252; *Stanton v. Embrey*, 93 U. S. 548, 555.

⁶ *Troy Iron & Nail Factory v.*

takes down the evidence and proceedings upon trial and afterward transcribes the same in full. This draft is then returned with the master's report and becomes the record. In jurisdictions where the master is not to return this evidence with his report, a party is required of him to certify so much of the evidence, objections, and exceptions as may be necessary to enable the court to review the legality of the master's rulings. It is the duty of the party asking the reviewing tribunal to correct an error to see that his objections and exceptions are properly a part of the record.¹

In California it is held that exceptions to the rulings of a referee, made during the progress of a trial, must be taken in his report, or made a part thereof by being proposed and filed by him. These exceptions may then be passed upon by the court on a motion for a new trial;² and in New York it is held that such exceptions need not be restated in the master's report.³ In Pennsylvania exceptions to the rulings of the referee in an equity case must be taken under a rule of court, preserved by a bill of exceptions, and sealed by the referee, precisely as in a trial at law. In Arkansas exceptions must be taken to the master's report on a hearing and stated in his report. It is provided by statute that, "if either party shall except to the competency of any witness, or to the admission or exclusion of any evidence, the master, if required, shall state the substance of the exceptions in his report."⁴ Under this provision a party should first interpose his objection to the master's rulings, and if the master rules against him, he then takes an exception, which objection and ruling, upon his request, the master is required to state in his report. After the report is filed he has four days to file exceptions.

Corning, 6 Blatchf. 328, 331, Fed. Cas. 14,196.

¹ City of Delphi v. Lowery, 74 Ind. 520, 523; Camden v. Doremus, 44 U. S. (8 How.) 515, 530; Russell v. Brantingham, 8 Blackf. (Ind.) 277.

² Tyson v. Wells, 2 Cal. 122, 131; Phelps v. Peabody, 7 Cal. 50, 53.

³ Cowen v. Village of Manhattan, 48 Barb. 48; Mayor, etc. v. City of New York, 24 How. Pr. 189.

⁴ 1 Brewster, Eq. Pr. § 100.

⁵ Sandel's and Hill's Statutes, . . . 5956.

the same, which he must do if he desires to question the correctness of the master's rulings on the admission or exclusion of evidence;¹ and in Indiana the practice requires that, on trials before a referee or a master in chancery, exceptions must be taken to the rulings upon the admission or rejection of evidence, and upon other matters, the same as upon a trial in court;² and such exceptions must be made a part of the record by a bill of exceptions, or by being embodied in the report.³

XII. ACCOUNTING IN THE MASTER'S OFFICE.

§ 291. **Accounting in the master's office—General principles.**—One great branch of work performed in the master's office is where references are made for the working out of details in matters of account, when the court declares that an account should be taken, and refers it to the master to investigate the items.⁴ Every lawyer who has much experience in the legal investigation of controversies growing out of complicated accounts will recognize at once the truth of Lord Ashburton's observations, that: "Intricate commercial accounts are seldom understood by lawyers, and can never be made clear to the judges who hear the case; and such questions, in my opinion, are very imperfectly decided, the decision generally turning on some legal technicalities, and very seldom on the merits of the case."⁵ Hence the propriety of working such matters out carefully in the master's office.

The importance of the subject requires that we should give it careful consideration, condensing into a few sections what would require, if space permitted, a volume to properly present. The whole machinery of courts of equity is better adapted for the purposes of an accounting than that of the courts of common

¹ *Id.*, § 5960.

² *Gilmore v. Board of Commissioners*, 35 Ind. 844, 847; *Way v. Fravel*, 61 Ind. 162.

³ *Board of Trustees v. Huston*, 12 Ind. 276; *Hauser v. Roth*, 37 Ind. 89; *Lee v. The State*, 88 Ind. 256, 259.

⁴ *Hart v. Ten Eyck*, 2 Johns. Ch. 513; *Consequa v. Fanning*, 3 Johns. Ch. 591; *Barrow v. Rhinelander*, 3

Johns. Ch. 614; *Maury v. Lewis*, 10 Yerg. 115; *Bryan v. Morgan*, 35 Ark. 113; *Barnebee v. Beckley*, 43 Mich. 613; *Harrington v. Bruce*, 84 N. Y. 103; *May v. May*, 19 Fla. 373; *French v. Gibbs*, 105 Ill. 523; *Beale v. Beale*, 116 Ill. 292, 5 N. E. 540; *Davis v. St. L. & S. F. Ry.*, 25 Fed. R. 786.

⁵ *Cory, Treatise on Accounts* (1839), pp. 188, 189.

law; and in many cases, when accounts are complicated, would be impossible for courts of law to do between the parties. Courts of equity, in cases of accounts, take cognizance sometimes from the verity of the case, and from the incompetency of a court of law to examine them with the necessary accuracy. But touching the equitable jurisdiction can be laid on this reason a court of equity reserves to itself a large measure upon the subject; and often assumes or rejects the jurisdiction of such cases, as the circumstances of the particular case render expedient.¹

§ 292. Accounting in the master's office — Principles — Continued.—“Where the state of accounts between the parties is complicated and intricate, where to do justice requires the employment of investigation peculiar to courts of equity, and where it would be very difficult for a jury to unravel the numerous conditions usually held to be sufficient to bring a case within the jurisdiction of a court of equity jurisdiction. The jurisdiction in such cases, does not, in such cases, depend upon the absence of law, but upon its adequacy or practicability and the creation of the court.”² A bill in equity for an account lies where there are mutual accounts between the parties, also where the accounts are all on one side, but where the circumstances of great complication or difficulties make adequate relief at law, or where a fiduciary relationship and a duty rests upon the respondent to render an account.

The jurisdiction of a court of equity in matters of account is not limited to accountings involving an equitable claim. Accounts may consist of matters purely legal in character, so that each item, on both sides, would be the subject-matter of an action at law, or of legal set-off. If accounts are so complicated that they cannot be tried at *nisi prius* with the care and deliberation necessary to reach an accurate result, a court of equity may

¹ *Seymour v. Long Dock Co.*, 20 N. J. Eq. 896, 407; *N. E. Ry. Co. v. Martin*, 2 Phill. Ch. R. 758; 1 Story, Eq. Juris., § 451. ² *Crown Coal & T. Co. v. Bell*, 177 Ill. 584, 540, 52 Ill. 177; *Gleason & Bailey v. Man*, 166 Ill. 25, 28.

assume jurisdiction, even after an action at law has been commenced.¹ But a bare statement by the complainant that the accounts are so complicated that they cannot be stated and settled at law is not sufficient, for he must state facts, as the court cannot accept his opinion. It is a fundamental rule of equity pleading, to be observed in all cases, that the bill must state facts sufficient to show a case within the jurisdiction of the court; if it fails to do so, no relief can be given. Where a party seeks an accounting in equity, in a case in which a court of law has concurrent jurisdiction, based on the ground of intricacy or complexity, the accounts must be laid before the court, or their nature, character and extent so far disclosed that the court may see and judge for itself whether a proper case for the exercise of its jurisdiction exists or not.² A distinction is made in determining jurisdiction in equity of matters of accounting between cases where a court of law has already taken cognizance of the matter, and a case where a court of equity is appealed to in the first instance. The authorities show that there are many cases in which a court of equity will entertain in matters of account, in the first instance, where, if the party making the claim had proceeded at law, the court would not, if applied to for that purpose, withdraw the matter from legal jurisdiction. Conceding the widest authority of a court of equity to take cognizance in matters of accounting, whether they be of a fiduciary character or otherwise, and the superior advantage it possesses in the form of procedure for doing complete justice, these courts have been careful not to interfere where there is concurrent jurisdiction in courts of law, and where the latter have first taken cognizance, unless a plain case is made in the bill.³

§ 293. **Preliminary order.** In the first instance the court should only hear the evidence upon and determine whether there should be an accounting or not,⁴ yet, while this is the

¹ *Ely v. Crane*, 87 N. J. Eq. 157.

² *Id.*

³ *Crane v. Ely*, 87 N. J. Eq. 564, 571; *Ely v. Crane*, *id.* 157; *Southeastern R. R. Co. v. Brogden*, 8 Macn. & G. 8; *Sweeney v. Williams*, 86 N. J. Eq. 627; 1 Pom. Eq. Jur., § 179.

⁴ *Hudson v. Trenton Locomotive*

etc. Co., 16 N. J. Eq. 475; *Walker v. Woodward*, 1 Russ. 110; *Law v. Hunter*, *id.* 100; *Tomlin v. Tomlin*, 1 Hare, 236; *Dubourg, etc. v. United States*, 7 Pet. 625; 2 *Daniell*, Ch. Pr. 997; *Gresley's Eq. Ev.* 168; *Seaton's Decrees*, 4th, 45.

general rule, the court will, in particular cases, hear evidence upon and give directions as to specific items of account.¹ The principle is constantly recognized and acted upon. The duty of the court is to determine whether the party is liable to account, and in determining this question it is proper to introduce proof, except such as may be necessary to settle the principles which are to govern the master's account.² By this interlocutory decree the court is to ascertain and fix what parties are beneficially interested in the estate, and this may be done by taking proof in open court, and until this is done it is irregular to refer the account to a master. But where the parties before the court are a class, such as the children of the ancestor whose estate is administered, and the circumstances such that the court can be reasonably satisfied that all persons beneficially interested are parties to the record, the court may, at the time of the inquiries, also order that if the master shall find that the persons beneficially are parties to the suit, he shall proceed to take the account.³ This course saves a preliminary hearing and report, the whole work being done under one order of reference.

Regularly there should first be a finding of the facts, the ownership, or the facts in issue upon which the right to the account depends, before an account is taken. This is the sensible and logical order of proceeding. The facts and legal questions in issue, if any, which must be determined before an account, should first be determined, and then the taking of the account may well be referred to a master. His duty is then largely one involving accurate bookkeeping, and incidentally involving questions of fact as to dispute the account.⁴ Having determined that the parties

¹ *Hudson v. Trenton Locomotive, etc. Co.*, 16 N. J. Eq. 475; *Consequa v. Fanning*, 3 Johns. Ch. 590. *Walker v. Woodward*, 28, 26; *Law v. Hunter*, 28, 26; *Desty*, Fed. Proced., r. 1.

² *Hudson v. Trenton Locomotive, etc. Co.*, 16 N. J. Eq. 475, 478; *Izard v. Bodine*, 9 N. J. Eq. 309; 2 Smith's Ch. Pr. (4th ed.) 857.

³ *Baker v. Harwood*, 23 Bates, Partn., § 1. ⁴ *Best v. Pike*, 93 V. (Appendix), 169, No. 202.

⁵ *Pulliam v. Pulliam*, 10 Fed. R. W. 697.

to account, the next duty of the court is to determine, so far as it can, "the extent to which it shall go, and the principles that shall guide the master in stating it."¹

The practice in chancery where an accounting is prayed and where the right to an account is denied is, that the preliminary matter in bar of the accounting should first be disposed of. A decree is then entered finding the facts to exist which give a right to the accounting, directing the basis of the account, and referring the whole matter to the master in chancery to take evidence as to the state of the account, and to report the evidence and a statement of the account.² Yet it is said there are cases where it may be better to refer the cause at once. A court of chancery may, with perfect propriety, refer an account generally, and, on return of the master's report, determine such questions as may be contested by the parties; or it may, in the first instance, decide any principle which the evidence in the cause may suggest, or all the principles upon which the account is to be taken. The propriety of the one course or the other depends on the nature of the case. Where items are numerous, the testimony questionable, the account complicated, the superior advantage of a general reference, with directions to the master to state specially such matters as either party may require, or which he may deem necessary, will readily be perceived. But where the account depends on particular principles which are developed in the cause, the convenience of establishing those principles before the account is taken will also be acknowledged. The discretion of the chancellor will be guided by the circumstances of the case, and his decree ought not to be reversed because he has pursued one course or the other, unless it shall appear either that injustice has actually been done, or that there is reason to apprehend it has been done.³

§ 294. Preliminary order — Continued. — The practice has been laid down as follows: As a general rule the court

¹ Pulliam v. Pulliam (U. S. Cir. Ct. Ill. 649, 39 N. E. 477, and cases cited. W. D. Tenn.), 10 Fed. 28, 27; Field v. Holland, 6 Cranch, 8; Dubourg v. United States, 7 Pet. 625. On the necessity of a preliminary hearing and an order in a case of complicated accounting, see *ante*,

² Ligare v. Peacock, 109 Ill. 94; §§ 124-127. Rhodes v. Ashurst, 176 Ill. 851, 52 N. E. 118; Moffett v. Hanner, 154 Ill. 8, 25, 26. ³ Field v. Holland, 6 Cranch (U. S.),

will not, at the original hearing, examine or decide whether particular items of the account shall or shall not be allowed. The court must, it would seem, settle the construction and effect of agreements between the parties, by which their usual dealings were regulated, and by which, consequently, the account must be controlled. The court will give special directions to the master as to the manner of taking the account, and the principles by which he should be governed in taking it. The decree must direct to what matters the account shall extend; and in decreeing a general account, special directions will be rendered proper and necessary by the particular circumstances of the case. Where the evidence has been taken on both sides before the hearing without objection, it may be used by the court, so far as may be necessary in giving directions.¹ The evidence necessary in the first instance is that which proves the defendant to be an accounting party, and then an order of reference follows as a matter of course, and any evidence as to the particular items of an account, however useful it may be in a subsequent stage of the case, is irrelevant in the first instance.²

The order of reference in such cases should cover three essential points:

First. Find the facts.

Second. Direct the basis of accounting.

Third. Order the production of books and papers bearing upon the accounting.

This last branch of the order usually is as follows: "And for the better taking said account, and discovery of, and ascertaining the several matters aforesaid, the parties shall produce before the said master, on oath, all books, papers and writings in their custody or power, or in the custody or power of any of them, relating thereto."³

The necessity of a preliminary order fixing and directing the basis of accounting has been fully shown in a previous chapter.⁴

¹ *Hudson v. Trenton, etc. Mfg. Co.*, 16 N. J. Eq. 476; *Beach, Eq. Pr.*, § 674, note 2. *Lockett v. Lockett*, L. R. 4 Ch. 1 Dan. Ch. Pr. 857 and note; *Wiley's Eq. Ev.* 168.

² *Dubourg de St. Colombe v. United States*, 7 Pet. 825, 826; *Hudson v. Trenton, etc. Mfg. Co.*, 16 N. J. Eq. 475; ³ *Hart v. Ten Eyck*, 2 John. Ch. 1; ⁴ *Ante*, ch. III, §§ 120-124, and form of order, see *ante*, ch. IV, § 124.

§ 295. **Bringing in the accounts.**—Prior to 1828 the party required to account was expected to establish the account, item by item, but in that year the practice was completely changed by the sixty-first rule of the English chancery practice. By the adoption of this chancery order of that date the plan of stating an account in the master's office was completely revolutionized; and, considering the ease and readiness with which the actual state of the account can be placed before the court or master by the method provided by this rule, we are surprised that the old, tedious method, previously followed, was not abolished long before it was. By this rule the old method of taking accounts before the master, by tediously proving every item, was abrogated by adopting the method of requiring the accounting party to state his account in the form of debit and credit, which being verified by the affidavit of the party, stands as a basis of the account, in which the other party must show error by proof before the master.¹

The English Chancery Order of 1828, referred to above, relative to the practice in stating an account in the master's office, was intended to, and, as a matter of fact, did entirely supersede the old, cumbersome and awkward method of proceeding by "charge and discharge," which prevailed before that time. The rule referred to, No. 61 of the Chancery Orders of that date, is as follows: "That all parties accounting before the masters shall bring in their accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the accounts so brought in, shall be at liberty to examine the accounting party upon interrogatories, as the master shall direct."²

The old method of stating an account by "charge and discharge" may be briefly stated as follows: The plaintiff filed his bill for an accounting. In due time he procured an answer from the defendant, also the examination of the defendant upon written interrogatories, and also the production of all books and papers bearing upon the questions involved. From the schedules appended to the answer, from the inspection of

¹ Pulliam v. Pulliam, 10 Fed. 23, 31; ² 2 Browne's Ch. Pr. (ed. 1830) 814;
³ Daniell, Ch. Pr. 1232. For burden of proof in cases of accounting, see post, § 343.

such books and papers, and from the examination of the plaintiff's books, the plaintiff's solicitor framed a document called a "charge." It was so called because it only contained the debit side of the account, which the plaintiff insisted should be charged against the defendant, that is, it only showed the debit side of the account as made out by his adversary. At a hearing in the master's office the plaintiff's solicitor read the charge in the presence of the defendant, and such of the items as were disputed were queried in the margin of the charge. At a subsequent hearing the master heard the objections to these queried items, and gave his opinion as to whether the defendant ought to be allowed the items. The undisputed items of the charge, together with the items allowed by the master, then constituted the balance established against the defendant, who was then required to bring in his "discharge," a document showing the credit side of his account. This discharge was given by item, in the same manner as the charge, thus allowing such items as were undisputed, or shown to be just and proper; and these two documents showed the balance or credit side of the account to be returned by the defendant.

But, under the present rules, you arrive at the first instance, the accounting party being now required to bring in his account with the debit and credit sides of it, as in an account current, when, if any of the parties before the master are dissatisfied with such account, they are at liberty to examine the account.

Mr. Browne, in commenting upon the introduction of this innovation, says, after detailing the old course of proceedings by charge and discharge, and the warrants upon the defendant, that a considerable time had been thus uselessly spent in procuring the attendance of the defendant (if he died in the *interim*), you might then compel him to bring in his discharge before the master, and produce

¹ This synopsis of proceedings in the master's office of a charge and discharge see *Pr.* (ed. 1834), pp. 48-50. ² This synopsis of proceedings in the master's office of a charge and discharge, is but a mere outline. *Pr.* (ed. 1818), p. 2. For full details see 2 Browne's Ch. *Pr.* (ed. 1880), 814 *et seq.*, and for form of a charge and discharge, Blake Smith, Ch. *Pr.* 49. ³ 2 Browne's Ch.

Under the present orders you arrive at this step in the first instance; such accounting party being now obliged to bring in his account with the debit and credit sides in the usual form of an account current."¹

§ 296. **Bringing in the accounts — Continued.**— Under the English practice this examination was upon written interrogatories, but, under the rule as modified, the almost universal practice now is to examine the accounting party *viva voce* in the presence of the master. The rule above referred to has been generally adopted by the chancery courts of this country. Rule 107 of the court of chancery of New York, United States Equity Rule No. 79, Circuit Court Equity Rule No. 71 of Wisconsin, Chancery Rules Nos. 90 and 91 of Alabama, and Chancery Rule No. 3 of the "Rules Governing Masters in Chancery" of the circuit and superior courts at Chicago, are almost all literally copies of the English Chancery Order of 1828.² Under these rules it is the duty of the master to require each party to make a statement of the disputed items. "This is in accordance with well settled practice."³ In an accounting the proper practice is for the master to require the parties to submit the written statement of disputed items. This is the correct practice.⁴ This statement of items forms the basis for taking the evidence, that is, the evidence submitted by the respective parties is either in support or denial of these disputed items; in other words, the list of disputed items forms the issues, and it is not proper for the party, on objections to the draft of a master's report, to dispute for the first time items not included in the list.⁵ If a party fails to do so, the master may make an order requiring him to furnish such account. This order should not be granted until the first hearing of the reference. The order must be personally served by copy, giving notice of the day to which the hearing is adjourned. Serv-

¹ Browne, Ch. Pr. 816, quoted in 1 Lamp Heater Co. v. Fisher, 1 Fed. R. Hoffman, Ch. Pr. 523. 91.

² Powers v. Dickie, 49 Ala. 81, 83. See Rev. Code, p. 835; O'Neill v. Perryman, 102 Ala. 523, 14 So. 898; Remsen v. Remsen, 2 Johns. Ch. 494; Reed v. Jones, 8 Wis. 491, 467; Story v. Brown, 4 Paige, 111; Pulliam v. Pulliam, 10 Fed. 23, 31; Kerosene

³ McMannomy v. Walker, 63 Ill. App. 259, 278; Patterson v. Johnson, 113 Ill. 559; 2 Daniell's Ch. Pr. 1222. ⁴ Patterson v. Johnson, 113 Ill. 559, 580; Remsen v. Remsen, 2 Johns. Ch. 495. ⁵ Id.

ice may be made by any disinterested person. If
ant fails then to appear he may be adjudged in cor

§ 297. **Bringing in the accounts — Continued.**—
107th New York rule, requiring each party to bring
count in the form of debtor and creditor, it became
to know the application of this method to an account
took the place of the old system of charge and discharge
partnership accountings. Application was therefore
the chancellor, through Mr. Rhoades, to ascertain the
tion of the rule in regard thereto and the chancellor
the following information: "Under the 107th rule
ner states his own account with the firm, in the
and Cr. But neither party is required to state the
the firm with other persons in that manner. Such
object of the reference. The partnership books
sheet must show the state of the concern; but each
charges the firm with all he advances, or does
is all he can do; neither party is presumed to have
means than the other of stating the concerns of the
third persons, and the master in making up his schedule
be guided by the books, unless they are shown by
the other to be erroneous. The practice was not
be altered in this particular. Such is the construction
of the rule, and such has always been the practice
as master, under it."¹

When such statement is made, objections there
the trial court and the appellate tribunal the issue
parties, so the same may be comprehended and
These objections and exceptions are the "pleaded
items of account" and must be specific and not
they can then be reviewed by the appellate court
court.²

The proper practice is to state the objections to
in the form of distinct and specific allegations, yet
not absolutely precluded, by the exceptions formal
fore the investigation, from making further or other

¹ *Kerosene Lamp Heater Co. v. Fisher*, 1 Fed. R. 91.

² *Dias v. Merle*, Sept. 1881, quoted
in 1 *Hoffman*, Ch. Pr. 523, note.

³ *Moffett v. Hannel*,
655, 39 N. E. 477, and c

the existence of which he did not know and had no means knowing when his exceptions were filed; but the adverse party has a right to have an opportunity to be heard on the objections, and to produce evidence in his behalf in regard to them.¹ When an account is thus stated in the form of debtor and creditor it renders it easy for a dissatisfied party, on proper exception, to present any question to the chancellor for review. If a party objects to an item of charges, or of credits, it should appear by his exception precisely what the item objected to is, and the ground of objection. This enables the chancellor to correct such item, if erroneous, and leave the remainder of the account, as stated by the master, to stand. When this is done the court can easily determine whether the item is a debit or credit thus isolated is a legal charge, or a legal credit, and whether the proof bearing upon it is sufficient or insufficient. If the party does this he has no ground of complaint if the chancellor refuses to aid him. It is no part of the business of the court to "turn aside and help a party make out his case."² Where a party is required to bring his account before the master under this rule, he must bring in his whole account, including debits and credits, and for the whole time for which he is held accountable, as established by the decretal order. The account must be accompanied by the usual affidavit of the party as to the correctness of the several items on both the debit and credit side, according to the best of his knowledge and belief, and that he does not know of any error or omission in the account to the prejudice of any of the other parties in the case.³ Not only is it the duty of a party to state his account in the form of debtor and creditor, but he has the right to insist upon stating it in this form. Upon an accounting before the master it is the right of a party to submit to the master a statement of the account as shown by the books, such statement being verified by the person who made it, and the other party, if dissatisfied with such statement, is at liberty to make, or cause to be made, a correct statement. If such party refuses to submit such corrected statement he is in no position

¹ *Tucker v. Tucker*, 28 N. J. Eq. 228; ² *Powers v. Dickie*, 49 Ala. 81, 83.
³ *Metzger v. Metzger*, 1 Brad. Surr. 265; *Gardner v. Gardner*, 7 114.

to find fault with the master for acting on the presumption that the original statement is correct.¹

§ 298. Bringing in the accounts — Continued — Form of the account.— The account mentioned in the preceding sections may be substantially in form as follows:

Statement of Account.

STATE OF ILLINOIS, } County of Cook, }	ss. In the Circuit Court of Cook County
John W. Berry, Complainant,	} Gen. No. 179,241. In Chancery.
v. James T. Long, Defendant.	

The account of the defendant, James T. Long, produced and exhibited before Horatio L. Wait, the master to whom the cause stands referred, pursuant to a decretal order made therein, dated the 9th day of August, A. D. 1902.

Dr. James T. Long, defendant, in account with John W. Berry, complainant.

1902.		1902.
Apr. 8, To cash.....	\$45,909	June 12, by cash.....
" 12, " 4580 bushels of wheat	2,290	" 22, by 5 horses.....
" " " 14 bbls. pork.....	1,400	July 8, " amount of note..
		Aug. 9, " cash.....

STATE OF ILLINOIS, } County of Cook. }	ss.
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James T. Long, defendant in the above cause, being duly sworn according to law, on oath says that the above schedule of account, marked "Exhibit A," contains, to the best of his knowledge and belief, a just and true account of all matters in account between this deponent and the complainant in said cause; and further, this deponent verily believes that the items of said account, both on the debit and credit side of said schedule, are correct, and that he does not know of any error or omission in the account contained in said schedule to the prejudice of either of the parties to this cause.

JAMES T. LONG,
Defendant.

Subscribed and sworn to before me this 22d day of September, A. D. 1902.

WILLIAM S. TRAVERSE,
Notary Public.

¹ Farwell v. Huling, 133 Ill. 112, 118, 23 N. E. 438. of course, to suit the facts of the case. For form of administrator's account, see 8 Hoffman, Ch. Pr., form No. 1.

² The above form must be varied, see 8 Hoffman, Ch. Pr., form No. 2.

299. Limit or range of investigation.—The master will frequently find the range or limit of his investigation fixed by order of reference, by the pleadings, or by an act of the parties. Thus the court may in the order designate the particular subject or line of inquiry, and again the parties may by a stated account limit the time of the beginning of the investigation. In matters of accounting the inquiry is confined to items of the accounts with their dates as set out in the bill, and is limited by the order of reference, although the bill may contain a general prayer "for a full account concerning the premises."¹ Where the charges in the bill are specific, setting forth the items of the account, with their dates, on an order of reference for an accounting, the inquiry is not to be opened beyond the special matter charged, although the bill may contain a general charge at the conclusion, and a prayer for a full account concerning the premises.² So, too, the range of inquiry may be limited by a settlement or account stated. An account stated is an account which has been rendered by the creditor, and assented to by the debtor as correct, and relates to some previous transactions or dealings between the parties. Where a bill of goods sold is presented to the vendee, who gives an order on a third person in payment before the bill is paid, and as a part of the original transaction, and in fulfillment of the original contract, there is no account stated.³ Some items of an account may be conceded to be correct, yet, if the account at the same time, as a whole, is in dispute it is not an account stated."⁴ "An account stated is an agreement between the parties that all the items of the account are true, and the balance as struck correct, together with a promise, express or implied, for payment of such balance."⁵ It is essential to an account stated that there was an examination of the items by each of the parties, and an agreement, express or implied, as to the correctness of the allowance of the amounts

Cardue v. Brooks, 85 Ala. 459, 11

App. 293; *Beach, Eq. Pr.*, sec. 663,

&

Consequa v. Fanning, 3 Johns. Ch.

Cruman v. Owens, 17 Or. 533, 31

565.

¹ *King v. Machesney*, 80 Ill. App. 240, 243.

² *Id.* As to what is an account stated see *Story's Eq.*, § 526 *et seq.*; *Am. & Eng. Ency. of Law*, vol. 1, p. 437 *et seq.*

of their respective claims, and of the balance struck on the adjustment of the account.¹

The order of reference may be silent as to the time for the beginning of the statement of the account, and the pleadings may fail to disclose any settlement or stated account, yet the evidence may show a full and complete settlement of all matters in controversy, in which event, if the complainant desires to attack the settlement or account stated, he should obtain leave to amend his bill charging fraud or mistake and asking leave to surcharge and falsify. Again, the answer of the defendant may set up as a defense a settlement of the matters in controversy. The master, therefore, in stating the account must look carefully into the pleadings to see how far they limit his authority. Thus a bill for a partnership accounting was silent as to any settlement between the parties, but the answer set up a settlement at a certain time and gave an account from that date; upon this state of the pleadings, the court ordered a reference to state the accounts. The solicitor for the complainant insisted that the master should state the accounts from the beginning of the partnership, while defendant's solicitor contended that the master should begin at the date of the settlement. The court sustained the latter contention, holding that under this state of pleadings the master was not at liberty to disregard the settlement.² Under such circumstances, if the complainant desires to parry the effect of the settlement set up in the answer, he must amend his bill, because such settlement is *prima facie* correct.³ Such amendment to the bill should deny the existence of such settled account, or, if admitted, attack it on the ground of "fraud, mistake, omission or inaccuracy."⁴ The parties themselves, if upon terms of equality, are better able to make a correct statement of their account than any third person. The good sense in the following statement of Chancellor Walworth is evident: "The modes of keeping accounts are so various that it is difficult for third per-

¹ Stenton v. Jerome, 54 N. Y. 480;

Murphy v. Rott, 26 Wkly. Dig. 124;

Smith v. Harris, 26 Wkly. Dig. 528;

Allen v. Woonsocket Co., 11 R. I. 288;

Bussey v. Gant, 29 Tenn. (10 Humph.)

238.

² Merrett v. Ex'rs of Merrett, 7

N. J. Eq. 557.

³ Brown v. Van Dyke, 8 N. J. Eq.

795, 802, 55 Am. Dec. 250.

⁴ Id.

to understand them, in many cases, with all the lights which the evidence in a cause can throw upon recent transactions. The practice of opening accounts, therefore, which parties who could best understand them have themselves attempted, is not to be encouraged. And it should never be done upon a mere allegation of errors, supported by doubtful or even probable testimony only; especially where the parties to the settlement stood upon terms of perfect equality, as there should be no pretense of fraud or imposition practiced by one party upon the other."¹

300. Limit or range of investigation — Continued.— A settlement of mutual accounts presumptively covers everything, whether mentioned or not, and is conclusive unless impeached for fraud or mistake.² An account stated and settled binding upon the parties as to all known demands then existing in the absence of any fraud or mistake.³ Not only is such account presumed to cover all matters between the parties, it is presumably correct, and the burden of proof is on the party attacking it. The *onus probandi* is always on the attacking party, for the court takes it as a stated account and establishes it; but if any party can show any reason for which a balance ought to be that is a surcharge, or if anything is introduced that is a wrong charge, he is at liberty to show it, and if it is a falsification; but that must be by proof on his side; that makes a great difference between the general cases of an open account and where there is a right to surcharge and falsify, for such must be made out.⁴

The difference between an open account and an account stated is simply this: In establishing an open account the burden of proof is upon the party presenting it, while in the case of an account stated, the presumption is that it is correct and the burden of proof is transferred to the party attacking

Wilde v. Jenkins, 4 Paige, 491, 495; *Am. R.* 341; 1 *Am. & Eng. Encyc. of Law*, p. 463, and notes.

W. v. Van Dyke, 8 N. J. Eq. 795, 65 Am. Dec. 250. The terms "surcharge" and "falsify" defined. *Freeman v. Bolzall*, 63 Wis. 378, 23 N. W. 708.

Story's Eq., vol. 1, § 525; *Pitt v. Cholmondeley*, 2 Ves. 565, 566; *Perkins v. Hart*, 11 Wheat. 237, 256; *Charlotte Oil & F. Co. v. Hartog*, (C. C. App., 4th ed.), 42 U. S. App. 716, 85 Fed. Rep. 150, 29 C. C. A. 56.

W. v. McTague, 114 Pa. St. 82, 60 *Pitt v. Cholmondeley*, 3 Ves. Sr. 565; 1 *Story. Eq.*, § 523; *post*, § 343.

it.¹ And in attacking a stated account a party who has appeared to surcharge and falsify is not confined merely to errors in fact, but may take advantage of errors of law as well. Such a settled account is only *prima facie* evidence of its correctness, and it may be impeached by proof of unfairness, mistake in law or in fact.² A stated account may be impeached, either wholly or in part, on the ground of fraud or mistake. If there be fraud, or if any mistake affects the whole account, the whole will be opened and a new account will be directed to be taken, without reference to that which has been stated; but if there be no fraud, and if no mistake affects the whole account can be shown, but the correctness of some of the items in it are, nevertheless, disputed, the account already stated will not be treated as non-existing, but will be acted upon as correct, save so far as the party can show it to be erroneous. In case of fraud an account will be opened *in toto*, even after the lapse of a considerable time; but if no fraud be proved an account which has been long settled will not be re-opened *in toto*; the utmost which the court will then do will be to give leave to surcharge and falsify.³ The distinction between an "account settled" and an "account stated" is discussed and the rule laid down that an "account settled" requires more evidence to overcome it than an "account stated," but the correctness of both may always be questioned by the parties unless some principle of estoppel intervenes.⁴ The law favors settlements, and courts will not open or disturb them but for very cogent reasons. Hence where parties have mutually stated an account of their dealings with each other, and have adjusted balances on the basis of it, notwithstanding short of clear and satisfactory evidence of fraud or mistake will justify the falsifying or surcharging of such account.

¹ *Rehill v. McTague*, 114 Pa. St. 82, 18 N. Y. 285; *Stenton v. Jerome*, 94, 60 Am. R. 341; *Halsted v. Tyng*, 29 N. J. Eq. 86, 18 N. Y. 480, 484; *Perkins v. Hart*, 11 Wheat. 287, 256.

² *Roberts v. Kussin*, 8 Atk. 112.

³ *Perkins v. Hart*, 11 Wheat. 287, 256. ⁴ *Hoyt v. McLaughlin*, 52 Wis. 283; *Klauber v. Wright*, 52 Wis. 308, 8 N. W. 893; *Martin v. B.*

⁴ *Rehill v. McTague*, 114 Pa. St. 82, 94, 60 Am. R. 341; 1 *Collyer's Partn.*, § 298. *with*, 4 Wis. 289; *Marsh v. Case*, Wis. 531, 534; *Kercheval v. Doty*, Wis. 476, 484; *Wilson v. Runke*, Wis. 526, 532; *Wilde v. Jenkin*, Paige, 481, 495; *Chappedelaine*

⁵ *Burrill v. Crossman*, 62 U. S. App. 368, citing *Lockwood v. Thorne*, Paige, 481, 495; *Chappedelaine*

§ 301. **Limit or range of investigation — Continued.**— Repeated settlements of long standing accounts may have been had, and yet, in a case appealing strongly to the court, the whole will be opened up from the beginning. In a case of this character Chancellor Kent said: "There are so many unpleasant and suspicious circumstances attending this case, leading so strongly to an inference of usury, oppression and fraud, that it appears essential to the honor of the court and the ends of justice that all these multiplied settlements and obligations should be set aside, and that an account, at large, from the commencement of their dealings, should be taken and stated." After an examination of authorities cited by counsel, he remarked further: "Indeed, the taking advantage of a man's necessities is as wrong as taking advantage of his weakness. This is not a case of merely showing mistakes and omissions in a stated account, in which a party is allowed to do no more than surcharge and falsify. Appearances wear a more serious aspect, and the whole account ought to be opened from the beginning, as was done in *Vernon v. Vawdy* (2 Atk. 119) after a period of twenty-three years. I do no more in this case than has been repeatedly done in other cases which were not more oppressive in appearance." This case was heard in 1815, and the court directed the accounts to be opened from 1790, a period of twenty-five years.¹

As to when the investigation shall terminate, it may be said that in ordinary cases relief can only be granted for matters occurring before and up to the filing of the bill, but cases of accounting, foreclosure cases and some others form exceptions to the rule.² A master to whom a cause is referred to state an account should receive testimony and state the account down to the time of hearing before him.³ But this does

Dechenaux, 4 Cranch, 306, 309; *Lockwood v. Thorne*, 11 N. Y. 170, 175, 63 Am. Dec. 81; *Philips v. Belden*, 2 Edw. Ch. 1, 14; *Chambers v. Goldwin*, 5 Ves. 384.

¹ *Barrow v. Rhineland*, 1 Johns. Ch. 550, 557, 558. As to the effect of laches on degree of proof required to open an account, see *post*, §§ 408-412.

² *Kelly v. Galbraith*, 87 Ill. App.

63, 68; *Brown v. Miner*, 21 Ill. App. 60; s. c., 128 Ill. 148, 157; *Rhodes v. The M. S. & L. Co.*, 63 Ill. App. 77; *Lowenstein v. Rapp*, 67 Ill. App. 678; *Sherman v. Foster*, 158 N. Y. 587-593, 53 N. E. 504; *Peck v. Goodberlett*, 109 N. Y. 180, 189, 16 N. E. 850; *Worral v. Munn*, 38 N. Y. 137, 148.

³ *Rhodes v. Ashurst*, 71 Ill. App. 242; *Rubber Co. v. Goodyear*, 9 Wall.

not apply if the time is limited by the bill¹ or by the order reference.²

§ 302. **Conclusions of the master — Stating the account.** In an accounting it is the duty of the master to state the items account fully either in the body of the report or in schedules attached thereto or returned therewith, so that the court and parties may readily see what items of account were allowed and what rejected.³ Where in an accounting the master fails to return an itemized account of the claims of the parties, but passes upon the accounts *en masse*, finding balances merely, is open to objection, and should be recommitted to the master for correction.⁴ In a recent Illinois case the court held that such a "report is so made up that the parties may not know what items enter into the statement of the account, and what disposition is made of them by the master, so that exceptions to his ruling can be filed, the court should, upon proper exception to the report, recommit it to the master, with instructions to conform to the proper practice."⁵ But where the master adopts the practice, as he did in the case referred to, stating the result in the body of his report and refers to schedules filed therewith for the particular items entering into the account, it will be sufficient. This course is sanctioned in *Daniell, Ch. Pl. & Pr. 1302*, and approved by the supreme court of Illinois; Judge Shope, writing the opinion, says: "The mode adopted is not, however, material, so that the items

788; *Hoe et al. v. Scott* (C. C. D. N. J.), 67 Fed. 220; *Curtis on Patents* (4th ed.), sec. 436; *Edison Electric Light Co. v. Westinghouse Electric & Mfg. Co.*, 54 Fed. 504; *Couscher v. Tulam*, 4 Wash. C. C. 442, Fed. Cas. No. 8,287; *Day v. Lockwood*, 24 Conn. 188; *Tutton v. Addams*, 45 Pa. St. (9 Wright), 67; *Providence Rubber Co. v. Goodyear*, 9 Wall. 788; *Canton, etc. v. Kanneberg*, 51 Fed. 599; *Holabird v. Burr*, 17 Conn. 556, 563; *Rhodes v. Ashurst*, 71 Ill. App. 342.

¹ *Creamer v. Bowers*, 35 Fed. 206.

² For proper method of placing the contents of voluminous books in

evidence on a hearing in the master's office, see *ante*, §§ 246-248.

³ *Prince v. Cutler*, 69 Ill. 267, 3; *Stewart v. Kirk*, 69 Ill. 509; *Mosier v. North*, 75 Ill. 190; *Mosier v. North*, 83 Ill. 519; *Gage v. Arndt*, 121 Ill. 496, 13 N. E. 188; *Snell v. De Land*, 188 Ill. 55, 27 N. E. 707. For proper method of making up the master's report in a case of accounting, see *post*, § 400 *et seq.*

⁴ *McClay v. Norris*, 4 Gilman. 3; *Gage v. Arndt*, 121 Ill. 496, 13 N. E. 188; *Snell v. De Land*, 188 Ill. 55, 27 N. E. 707.

⁵ *Snell v. De Land*, 188 Ill. 55, 61 N. E. 707.

account are in some convenient way designated, and the master's rulings thereon made sufficiently to appear."¹

In an accounting where the master reports as to a certain item that he has not thought fit to allow the same without the direction of the court, it leaves the question open as to this item notwithstanding no objection or exception is taken to such finding. As to such item the master neither allows nor disallows the same but leaves it open to be determined by the court.² Strictly speaking, as to such item the master has failed to execute the order of the court. If he can thus refuse to state his conclusion as to the one item he may do the same thing as to all. As to such item he simply reports the evidence and leaves the court to allow or disallow it. If the party who is dissatisfied wishes to contest the point he should move the court to send it back to the master, or ask the court to allow the item or disallow it. It is improper to except to the action of the master where he fails to do that which he is directed to do by the order of reference.³

§ 303. **Conclusions of the master — Stating the account — continued.**— There are certain cases where the master is required to proceed with great caution. For example, in opening up accounts stated between the parties, and also accounts settled by courts of peculiar and exclusive jurisdiction, such as courts of probate, upon the ground of fraud, public policy requires that the interference of courts of chancery should be restricted to and limited by the necessities of each particular case. The limit of the right of interference seems to be that it must "not exceed the necessity for the correction of fraud, accident and mistake, and for the prevention of irremediable mischief."⁴ Judge Story says:⁵ "In some cases, as of gross fraud, or gross mistake, or undue advantage or imposition, made payable to the court, it will direct the whole account to be opened and taken *de novo*. In other cases where the mistake, omission, or inaccuracy, or fraud or imposition, is not shown to affect or stain all the items of the transaction, the court will content itself with a more moderate exercise of its author-

¹ *Snell v. De Land*, 138 Ill. 55, 61,

111 Ill. 797. See also *Craig v. Mc-*
Neely, 73 Ill. 305, 314.

² *Johnson v. Child*, 4 Hare, 86, 90.

³ See post, §§ 427-431.

⁴ *Reinhardt v. Gattrell*, 38 Ark.
727-734.

⁵ *Eq. Juris.*, § 523.

ity. It will allow the account to stand, with liberty to plaintiff to surcharge and falsify it; the effect leave the account in full force and vigor as a except so far as it can be impugned by the one who has the burden of proof on him to establish mistakes. Sometimes a still more moderate course and the account is simply opened to contestation of more items, which are specially set forth in plaintiff as being erroneous or unjustifiable, and in respects it is treated as conclusive."

These rules apply more particularly to accounts also to accounts settled by courts of probate, but in the same latitude. The order of reference to an account of this kind should designate the particular part of the fraud or mistake consists and confine the scope of the correction of such errors, and any subsequent amendments which they entered and formed a part, and in doing so the master is expected not to depart from clear, certain allegations in the complainant's bill, and not to proceed to general charges. The burden of "establishing fraud and mistakes" rests upon the party alleging them, and he is expected to make his charges as certain and definite, and not mere high-sounding phrases, which, when analyzed, are found to mean nothing.

So far as matters of settled accounts are not in question, followed by proof, they must be permitted to stand. In a case of a reference of this kind, it is not sufficient for the chancellor to add in his order "that the accounts were fraudulent because of other errors" but the errors must be specified and the reference must be confined to them, and the accounts, as they may be affected by such errors. In this case a bill was filed to correct errors and amendments in the administrator's final settlement in the probate of the estate of Eakin, J., in support of the rule laid down above. The court are satisfied that this is the only safe rule of procedure, and which all the better and more competent clerks will shrink from the administration of estates, and that

¹As to the value of such high-sounding phrases in pleadings, see § 841.

²Reinhart v. Ga.

states will be encouraged to neglect the proper vigilance of their interests in the probate courts, in the hope of an eventual new hearing at some future day in a court of chancery.

. It was error in the court to annul the whole action of the probate court, and to order a new account from the beginning. The matters into which the elements of fraud entered should have been specified, and the reference confined to a re-examination of the accounts so far as they might be affected thereby, leaving them to stand in other respects as *res adjudicata*."

In some cases every presumption is against the accounting party. For example, where a trustee has kept his accounts in a negligent way, or kept no accounts whatever of his receipts, the presumptions are strongly against him, and obscurities and doubts should not operate to his advantage, but adversely. The rule will not be strictly applied when it will lead to conclusions at variance with the reasonable probabilities of the

304. Conclusions of the master — Stating the account — continued.—A different rule, however, applies where the party seeking the aid of a court of equity has been guilty of laches, it requiring a much stronger showing to justify the inference of the court than it would if he had been diligent in seeking its aid. A party seeking the aid of a court of equity must show reasonable diligence, if he expects to be heard with effect. This whole subject is fully treated in a future chapter making it unnecessary to add anything further here. Yet, notwithstanding this rule, there are some cases where, although the moving party has been guilty of laches, a more liberal course is pursued. For example, great liberality will be exercised where the transactions relate to family interests of the parties.¹

Another question sometimes arises as to what parties are entitled to relief, and against whom. For example, where a liability arises from an intentional wrongful act of several parties conspiring together, each is liable for all the resultant damage, and, in a case of accounting against such parties, the

¹*Clauvelt v. Ackerman*, 28 N. J. Eq. 502.

²*Morgan v. Morgan*, 48 N. J. Eq. 399, 402, 23 Atl. 545.

master may state the account against any one or more, or all of them. A conspiracy by which several wrongfully obtain the property or money of another and misappropriate it is not to be distinguished, in the joint and several liability of each, from a trespass in which all are alike guilty and are jointly and severally liable for all the damage sustained.¹ In such a case the injured party may sue all or any one of the wrong-doers, and if all are sued may take a decree against any one or more of the defendants. There is no such thing as contribution among wrong-doers, and a court of chancery will spend no time in balancing the responsibility for their wrongful acts.² In stating the account the master should present it according to the actual condition of the account, showing the balance to be in favor of either plaintiff or defendant, as the case may be, without any reference to the pleadings whatever. It is a universal rule that the party against whom a balance is found will be decreed to pay it.³ And no cross-bill is necessary for this purpose.⁴ If there are several defendants and there is a balance due from one to his co-defendant, the master should so find.⁵ In a bill praying for a general accounting between the parties, where the matter is referred to a master, he may find a balance in favor of the defendant, without any special prayer in his pleadings for a decree in his behalf.⁶

XIII. AMENDMENT OF PLEADINGS.

§ 305. Amendment of pleadings during the hearing in the master's office.— During the progress of a hearing in the master's office it is frequently discovered by the parties that

¹ Farwell v. Great Western Tel. Co., 161 Ill. 522, 597, 598, 44 N. E. 391.

² Attorney-General v. Wilson, 1 Cr. & Ph. 27; Farwell v. Great Western Tel. Co., 161 Ill. 522, 597, 598, 44 N. E. 391.

³ Acme Copying Co. v. McLure, 41 Ill. App. 397; Quinn v. McMahan, 40 Ill. App. 593, 599; Campbell v. Zabriskie, 8 N. J. Eq. 788; Wells v. Strange, 5 Ga. 42; Clarke v. Tipping,

4 Beav. 588, 594, 595; Knebell v. White, 2 Young & Coll. Exch. 15.

⁴ Acme Copying Co. v. McLure, 41 Ill. App. 397; Allen v. Allen, 11 Heisk. (Tenn.) 387.

⁵ Little v. Merrill, 62 Me. 328; Acme Copying Co. v. McLure, 41 Ill. App. 397.

⁶ Goldthwait v. Day, 149 Mass. 185, 21 N. E. 359; Wyatt v. Sweet, 48 Mich. 539, 12 N. W. 693; Mackenzie v. Flannery, 90 Ga. 590, 600, 16 S. E. 710, and cases cited.

an amendment of the pleadings is necessary, in order to make the allegations correspond with the facts as shown by the evidence, or to make new allegations to let in testimony not admissible under the issues as framed, or for some other reason in the interest of justice. In all such cases the party desiring to amend should ask the master to postpone a further hearing until application to amend can be presented to the court and leave either granted or denied. In all such cases where the master is satisfied that such application is made in good faith and not merely for delay, and especially if it appears that there is reasonable ground for the amendment, and that, in the interest of justice, leave to amend ought to be granted, such hearing should be postponed. If this is not done there are but two courses to pursue,—*rule out* the improper evidence, under the pleadings as they stand, and, if the facts as shown require it, find against the party desiring to amend, thus forcing him to renew his application upon the coming in of the master's report, which, if granted, necessitates a re-reference and a new hearing in the master's office; or, *admit* the improper evidence, and, if the case then demands it, make a recommendation for a decree in accordance with the facts as then shown, provided the court grants leave to make the desired amendment. Some masters invariably adopt this last course. The great objection to proceeding in this manner is that, when once you abandon the issues as framed by the court, all parties are at sea and the door opened for the admission of all kinds of rubbish, thus putting upon the parties, master and court, useless labor, if in the end leave to amend is denied by the court. The only safe and sure way is to obey the order of the court, and stick to the issues as framed until the same are changed or altered under leave of the court.

Where testimony is not strictly admissible because the bill is not sufficiently specific in its allegations, it is at any time subject to amendment, and it is the duty of the defendant, if he intends to contest the admissibility of such evidence, to object for that reason, and by thus calling the attention of the complainant to it to give him the opportunity to make the necessary amendment. Where no such objection is made before the master or trial court it is too late to raise it on appeal.¹ If

¹Snell v. De Land, 138 Ill. 51, 61, 27 N. E. 707.

upon the taking of proofs before the master either covers that it is necessary to have the pleadings issues modified, the master may, and it his duty; ends of justice apparently require it, suspend the taking of proofs until application can be made to such amendments, and if upon such applications amendments are permitted, and by so doing the issues varied or changed, a reference should be had, the same to such modified or changed issues. Any part of the master to alter or vary the issues amendments would be wholly irregular. The master have no more power in this regard than the clerk of the court.

§ 306. Amendment of pleadings during the master's office—Continued.—The master takes proofs and make his report upon the precise issues and any attempt to do otherwise would be to usurp the duties and functions of the court. In a Georgia case the master permitted an amendment to the bill, "No authority has been produced to us, and we object for the novel and extraordinary practice of amendment before the master. On principle, we are clear that the master has nothing to do with receiving amendments. He takes on such pleadings only as belonged to the case referred to him. The judge orders the reference upon the pleadings, as they stand, are ready for the master to make a case needing his services. If the case changes before the master himself, by amendment to him, the very reasons which induced the reference be amended away, and the master's functions become wholly useless. Each amendment of the bill, sufficient enough to vary materially the complainant's case, is a bill to demur. After such amendment the judge's objection of it, might not want the master's services. It is wholly inadmissible for the latter to proceed as if the case, taking cognizance of an amendment, heard the demurrer, and taking evidence touching the new issues. This is turning the master's office into a court of law for the time being, raising the master to the office

¹ *Ayers v. Daly*, 56 Ga. 119, 125.

So, too, in a case where the issues are made up and sent to a master or referee he must hear and report on the matter as submitted. It was therefore held to be error for a referee to permit the plaintiff to amend his complaint and require the defendant to answer the same, thus creating a new issue.¹ In some jurisdictions, however, either by statute or by rule of court, the master is vested with power to permit certain amendments affecting the merits of the cause; thus, under the rules of the chancery court of Upper Canada, after a reference, where it appears that any person, who is not already a party, has an interest in the matter litigated, the master may direct such person to be made a party, and that he be summoned to attend further proceedings before him.² Yet, upon a petition for rehearing of the same case, the chancellor said that he was "opposed to the introduction of any practice of adding such parties for the first time in the master's office, merely to remedy defects arising from the carelessness and negligence of the plaintiffs in the suit."³

While it is true that the master has no power to permit amendments to the pleadings, or other matters which come to him from the court, yet, he has the power to permit amendments of statements of facts, accounts, affidavits and all other papers prepared for submission to him or to be used in the hearing before him; but such power does not extend to amendments of the bill, answer or any other pleading in the case. The sufficiency or insufficiency of pleadings must be determined by the court; but in no case does this include the right to grant leave to amend if the master finds the pleading insufficient, but he simply reports his finding to the court. In a proper case the master will permit an amendment to a "state of facts," even after evidence has been taken under the state of facts as brought in before the amendment is asked.⁴

§ 307. **Liberally allowed by the chancellor — His discretion.**— A court of equity sitting for the purpose of ascertaining the facts in dispute between parties to a litigation and of afterward doing justice to each of the parties by calling to its aid established principles of equity applicable to such a state of

¹ *De la Riva v. Berreyesa*, 2 Cal. 195.

² *Id.*, vol. 8, 288.

³ *Patterson v. Holland*, 7 Grant's Ch. R. 563.

⁴ *Nelson v. Lord Bridport*, 6 Beav. 295, 299, 301.

facts, will not permit its object to be defeated by reason of a party's failure in the statement of his case to set out the actual facts as they turn out in evidence, or because a party mistakes the remedy applicable to the case, as shown by the proofs, but will allow amendments to be made, even on the hearing, so as to raise the proper issues, or to justify the court in granting the proper remedy.¹ The practice in the United States equity courts has long been very liberal as to amendments.² After the evidence is all in it is the usual practice and highly commendable, if the allegations and proofs do not correspond, for counsel to apply for, and the court to grant, leave to amend the pleadings, "so as to fit the case shown by the evidence," and it sometimes occurs that several amendments of this nature and for this purpose are made during the final argument of a cause.³ As a general rule, at the discretion of the trial court and when allowed in furtherance of justice, the upper court will not listen to an objection unless the discretion has been abused, or the party can show that his substantial rights have been prejudiced by allowing such amendment.⁴ Leave to amend always rests in the sound discretion of the court.⁵ This right of amendment is statutory,⁶ and ordinarily is not the subject of review. "This is too well established to justify argument or extended comment."⁷ It is true that all amendments to pleadings are in the discretion of the court, and for that reason the court may impose terms "so that undue advantage may not be obtained by the party asking the favor."⁸ It is also true that it is not material when leave to amend is granted except

¹ *Graffam v. Burgess*, 117 U. S. 180, 195, 6 Sup. Ct. R. 686; *Neale v. Neale*, 9 Wall. (U. S.) 1; *Hardin v. Boyd*, 113 U. S. 756, 764, 5 Sup. Ct. R. 771; *Wamburzee v. Kennedy*, 4 Desauss. 474, 480; 1 *Daniell's Ch. Pr.*, 1st ed. 474; 2d ed. 480.

² *Tufts v. Tufts*, 3 Woodb. & M. 456, 475, Fed. Cas. 14, 283.

³ *Gordon v. Reynolds*, 114 Ill. 118, 128, 28 N. E. 455; *Church v. Holcomb*, 45 Mich. 29, 40.

⁴ *Jefferson County v. Ferguson*, 13 Ill. 83; *McArtee v. Engart*, 13 Ill. 242, 250; *Moshier v. Knox College*, 82 Ill.

155, 163; *Mason v. Bair*, 38 Ill. 194, 199; *Farwell v. Meyer*, 35 Ill. 51; *Marble v. Bonhotel*, 85 Ill. 240; *De Wolf v. Pratt*, 42 Ill. 198; *Craig v. People*, 47 Ill. 487; *Hewitt v. Dement*, 57 Ill. 560, 562.

⁵ *Crone v. Crone*, 180 Ill. 599, 607, 54 N. E. 605.

⁶ Rev. Stat. Ill. ch. 32, title "Chancery;" *Booth v. Wiley*, 183 Ill. 84, 98.

⁷ *Booth v. Wiley*, *loc. cit.*; *Gordon v. Reynolds*, 114 Ill. 118, 123, 28 N. E. 455.

⁸ *Marble v. Bonhotel*, 85 Ill. 240, 248.

as to the terms or conditions which the court, in its discretion, may see fit to impose upon the party asking leave to amend.¹ No iron-clad rule will be permitted to prevent the court from granting leave to amend where it is necessary to prevent a wrong, or justice demands it. Every case must depend on its own circumstances, and it is said that it is immaterial when an amendment is made, except as to the terms the court, in its discretion, may see proper to impose as a condition to permitting it.²

§ 308. *Sworn pleadings.*—It is within the discretion of the chancellor to permit an amendment of a bill in chancery even where such bill is verified by the oath of the party. Indeed it is the proper practice to permit an amendment of such a bill, the same as any other, when such a course tends to prevent a failure of justice.³ But, even where the bill is sworn to, amendments are usually allowed in a court of equity for the purpose of furthering justice, and the court will be liberal in permitting amendments of the pleadings that complete justice may be done. The fact that the bill is verified by oath does not necessarily deprive the complainant of the benefit of an amendment.⁴ The rule is, however, more rigid in regard to amendments of sworn bills than it is relative to amending bills not required to be sworn to. In the former case four things are necessary:

First. A party who desires to amend a sworn bill must present to the court in writing stating distinctly the amendment proposed to be made.⁵

This is required of such party for two good and sufficient reasons:

(a) Because, unless this is done, the court has no means of knowing but that the amendments proposed are not of "the most frivolous character, calculated to harass and annoy the defendant by prolonging the litigation and increasing the expense."⁶

¹Gordon v. Reynolds, 114 Ill. 118, 123, 28 N. E. 455.

²Gordon v. Reynolds, 114 Ill. 118, 123, 28 N. E. 455.

³Thomas v. Coultas, 76 Ill. 493; Bauer Grocer Co. v. Zelle, 172 Ill. 407, 412, 50 N. E. 238.

⁴Marble v. Bonhotel, 85 Ill. 240, 248.

⁵Jones v. Kennicott, 83 Ill. 484; Campbell v. Powers, 139 Ill. 123, 136, 28 N. E. 1062.

⁶Campbell v. Powers, 139 Ill. 123, 138, 28 N. E. 1062.

(b) Because the court has the right to know in advance whether the party is seeking to contradict any statement made in his original bill.

While ordinarily an amendment will be permitted in the interest of justice, it is, however, no doubt true that he is estopped from so amending his bill as to contradict facts which he has sworn to be positively true, unless he can clearly show to the court that the former statement was the result of a mistake. But, when the amendment sought only enlarges or amplifies the statement, or states additional facts, no objection is received to such amendment being made, and should always be allowed where it appears to the court that it is in the interest of justice so to do.¹ In granting permission to amend sworn bills courts proceed with great caution. If the desired amendment is as to new facts there is greater reluctance to allow amendment depending upon extrinsic evidence than when the amendment is to be supported by documentary proof; and if the facts are known to the complainant, at the time of filing the original bill, the amendment will not be allowed, unless some excuse is given for the omission. "The party asking leave to amend should present and submit in writing the amendment proposed to be made, supported by an affidavit of its truth, and some explanation of the reason why the matter proposed to be added was not originally inserted."²

Second. This statement must be supported by the affidavit of the party that the several matters to be inserted as amendments are true.³ Such affidavit is not required when the evidence already taken in the cause discloses "the necessity and propriety of amending and broadening the pleading." Neither is it necessary under such circumstances to present the proposed amendment in writing.⁴

Third. He must furnish in his affidavit some explanation of the reason why the matter proposed to be added was not originally inserted.⁵

¹ *Marble v. Bonhotel*, 85 Ill. 240, 66; *Coal Co. v. Dyett*, 2 Edw. 248. 115.

² *Jones v. Kennicott*, 83 Ill. 484; ³ *Jones v. Kennicott*, 83 Ill. 484; *Gregg v. Brower*, 67 Ill. 525, 529; *Campbell v. Powers*, 139 Ill. 128, 28 N. E. 1062.

Campbell v. Powers, 139 Ill. 128, 28 N. E. 1062; *Calloway v. Dobson*, 1 Brook. 119, Fed. Cas. 2,325; ⁴ *Bauer Grocer Co. v. Zella*, 177 Ill. 407, 412, 50 N. E. 298.

Whitemarsh v. Campbell, 2 Paige, ⁵ *Jones v. Kennicott*, 83 Ill. 484.

Especially is this true if it appears that the new facts were known to the complainant at the time of filing his original bill, because, in such case, an amendment will not be allowed, unless some excuse is given for the omission.¹

Fourth. Application to amend must be made as soon as the necessity of amending is discovered.²

The foregoing provisions only apply to bills which must be sworn to. The rule undoubtedly is, that where a bill is not required by law to be sworn to, the fact of it being a sworn bill gives to it no additional validity or vitality, and performs no office or effects no change from what it would be as an unsworn bill, and the verification will be disregarded, and amendments allowed, as if it was not sworn to.³ Such amendments need not be sworn to, the rule applicable to amendments of sworn bills having no application. The usual practice, upon sustaining a demurrer to a bill of this character, is to allow amendments as a matter of course, upon such terms as the court may think proper.⁴ But in all cases of allowing amendments to bills it must never be forgotten that in granting leave to amend, the discretion of the court will only be exercised in the furtherance of justice. Its exercise is only warranted when necessary, or apparently necessary, to prevent the consummation of wrong and promote and further justice. Parties litigant have a right to insist that litigation shall not be unnecessarily prolonged, and unless there is some meritorious reason for further delay, the defendant may rightfully demand the dismissal of the bill and thus end vexatious litigation.⁵

§ 309. Time of asking leave.—While the courts adopt a liberal course in granting leave to amend the pleadings in a chancery proceeding, the party seeking such favor must apply

Campbell v. Powers, 189 Ill. 128, 187, 28 N. E. 1062.

¹ Gregg v. Brower, 67 Ill. 529; Caloway v. Dobson, 1 Brook. 119; Whitmarsh v. Campbell, 2 Paige, 67; Punate v. Hubbell, 1 Hill. Ch. 217; Coal Co. v. Dyett, 2 Edw. Ch. 115; Jones v. Kennicott, 88 Ill. 484; Campbell v. Powers, 139 Ill. 128, 186, 28 N. E. 1062.

² Rodgers v. Rodgers, 1 Paige, 424; Whitmarsh v. Campbell, 2 Paige,

66; Sharp v. Ashton, 8 Ves. & Beam. 144; Norris v. Kennedy, 11 Ves. 565; Mair v. Thellusson, 3 Ves. & Beam. 148, nota.

³ Downey v. O'Donnell, 92 Ill. 559, 561; Gordon v. Reynolds, 114 Ill. 118, 123, 132, 28 N. E. 455; Campbell v. Powers, 189 Ill. 128, 187, 28 N. E. 1062.

⁴ Id.

⁵ Campbell v. Powers, 189 Ill. 128, 187, 28 N. E. 1062.

for it within a reasonable time, otherwise it may be denied, or at most only granted upon terms. Thus while a cause is pending before a master, if a party desires to amend his pleading so as to change the issues and require the taking of additional testimony, he should make his application to the court for leave in apt time. After all the evidence has been submitted, the argument of counsel heard, the hearing closed, and the master engaged in the preparation of his report, it is too late to amend the pleadings, raising new issues requiring the reopening of the case and the taking of further testimony.¹ A party who, with a full knowledge of the necessity of an amendment, delays asking for it until it is apparently unreasonable to grant his request, will be required to account for his laches. Amendments are allowed by a court of chancery where the court can see that they are in the furtherance of justice and the opposite party will not be prejudiced thereby,² and, as was said by Mr. Justice Harlan, "great caution should be exercised where the application comes after the litigation has continued for some time, or when the granting of it would cause serious inconvenience or expense to the opposite party."³ For this reason, where there has been a delay of several years and permission to amend the bill not asked until the proofs are all taken, the request will be denied,⁴ and, after a cause has been prepared for trial and fully submitted upon hearing, the court will not so readily grant leave to amend as in the earlier stage when the issues are in a formative condition.⁵

While this is true, that a court will hesitate to allow an amendment where a party has been guilty of great laches, yet, at any time, amendments are in the discretion of the chancellor, even after the court of appeals has remanded a cause, unless it is done so with specific directions.⁶ It must not be forgotten that, especially where a great delay has intervened, the patience of a court may be so taxed by amendment after

¹ *Clyde v. Richmond & D. R. Co.*, 59 Fed. 894, 898.

² *Wolverton v. Taylor & Co.*, 157 Ill. 485, 494, 42 N. E. 49.

³ *Hardin v. Boyd*, 118 U. S. 756, 5 Sup. Ct. R. 771; *Wolverton v. Taylor & Co.*, 157 Ill. 485, 495, 42 N. E. 49; *Rich-*

mond v. Irons, 181 U. S. 27, 7 Sup. Ct. R. 788.

⁴ *Hoofstittler v. Hostetter*, 172 Pa. St. 575, 38 Atl. 758.

⁵ *Gubbins v. Laughtenschlager*, 75 Fed. 615.

⁶ *Henderson v. Harness*, 184 Ill. 520, 592, 56 N. E. 786.

amendment, and demurrers sustained thereto, that further leave to amend will be denied.¹

§ 310. **Radical changes in the issues not permissible.**—While a court of equity is thus liberal in permitting amendments in the furtherance of justice, it will not permit a party to elect to proceed upon one theory, until he has gone so far in the taking of his testimony as to find that he cannot succeed and then amend so as to place his case upon an entirely different theory, requiring a new answer and the retaking of the testimony. Such a radical change would not be in furtherance of justice, and would be injurious to the rights of a defendant. For this reason, after a reference to a master, a party will not be permitted to amend his bill so as to make substantially a different case from that presented by the original bill. If such an amendment were allowed, with the case still pending before the master, and the amended bill were answered, or demurred to, raising new issues of fact or law, we should have the cause split in twain and proceeding in sections, one branch of it before the master and the other before the court.² Where the court can see that to allow an amendment to a bill will require an amended answer and a further trial upon a new phase of the case, and no reason is shown why such new matter was not incorporated in the original bill, the court may very properly deny the motion for leave to amend.³ An amendment to a bill will not be allowed which is directly in conflict with the relief prayed for in the original bill.⁴

In a case where the special master had heard the evidence and argument, and had taken the case for consideration, and had prepared and submitted to counsel a draft of his report, in order that they might, if so desired, file objections thereto, the dissatisfied party came into court and asked and obtained an order that the master be directed to hear him on a motion to reopen the case for the purpose of setting up a different ground of recovery than that previously relied upon. This motion was granted without any directions to the master, who,

¹ *Fitch v. Gray*, 162 Ill. 337, 44 N. E. 726.

² *Hazard v. Hidden*, 14 R. I. 356.

³ *Wolverton v. Taylor & Co.*, 157 Ill. 485, 492, 42 N. E. 49.

⁴ *Bosley v. Phillips*, 3 Tenn. Ch. 649, 651; *Coleman v. Pinkard*, 2 Humph. (Tenn.) 185, 190; *Lloyd v. Brewster*,

4 Paige, 537, 27 Am. Dec. 88.

after hearing the parties, declined to reopen the case and submitted his report. This action of the master came up before the court on exceptions and the court sustained the master on the ground that it was too late, under any proper practice, to set up an additional and entirely new ground of negligence. The court said: "It has been held by this court that, after a master has heard evidence, argument, and taken the case under consideration, it is too late to amend. So it will certainly be too late after the report of the special master has been prepared, and drafts of it served on counsel. The court has allowed reports to be opened (in one instance at least, that is remembered) where, through inadvertence and oversight, it was clearly shown, counsel had failed to put in certain evidence which was material to their case; and the master, in his discretion, thought it was just to reopen it. But that does not affect the question here. . . . But the case is really controlled by the fact that, after the master had filed his report, it was too late to amend and set up an additional and new ground of negligence, and have the cause referred back to the master for further hearing on the new issue presented. Certainly it would require very unusual and peculiar circumstances to justify such action."¹

§ 311. How to amend — Effect thereof.— The loose practice of amending pleadings by interlineations should not be tolerated, and especially should erasures not be permitted. The opposite party has the right to insist that the pleadings as sufficient as they stood before leave to amend was granted, and, therefore, should not have his rights jeopardized by erasures and interlineations. Especially is this true of sworn pleadings. Thus, where a bill is sworn to, it is contrary to the practice of courts of equity to "permit it to be altered by striking out, as such an amendment to a sworn bill is not allowable except under very special circumstances."² Sometimes involves the necessity of filing supplemental pleadings. For example, the practice of amending the original answer has been discontinued, the course now being to amend or correct mistakes or omissions by filing a supplemental

¹ *Central Trust Co. of New York v. Marietta & N. G. Ry. Co.* (C. C. N. D. Ga.), 75 Fed. 41. ² *Swift v. Eckford*, 6 Paige

swer. If a defendant, by mistake or misapprehension of his rights, or of the facts in the case, makes a statement or admission in the original answer inconsistent with the truth, the court will grant leave to correct the mistake by way of supplemental answer. This gives the complainant the benefit of the original answer, together with the subsequent denials or corrections. In granting such leave the court acts with great caution, and only permits it to be done where there is an actual mistake and where equity and justice require it.¹ The effect of an amendment depends upon its character and the situation of the parties. If the parties are appearing before the master, they may stipulate that the amendment be made without prejudice to the reference and the order entered accordingly; but a different rule applies where some of the parties have been ruled to answer the original bill and been defaulted. In such a case the master must not forget that if some of the defendants have been defaulted and a reference afterward had and an amendment of the bill thereafter allowed, such amendment operates to set aside such default. In such a case the court should set aside the order of reference, enter the default of the defendant to the amended bill and then re-refer the cause to the master.²

An amendment of the bill *after* entry of the default of a defendant operates to set aside the order of default. An order of reference, or a decree *pro confesso*, is erroneous without defaulting the defendants to the amended bill.³ It is a rule of chancery practice that by the filing of an amended or supplemental bill all previous decretal orders are vacated. The plaintiff, therefore, must proceed in such case as if no previous decree *pro confesso* had been entered; that is, he must take a rule to answer the amended bill, and in case of failure to make such answer the default of the defendant may be entered.⁴ Therefore, when a bill is amended, proper practice requires the defendant to be ruled to answer the same. It is

¹ Hughes v. Bloomer, 9 Paige, 269; Rees, 50 Ill. 383; Black v. Lusk, 69 Dolder v. Bank of England, 10 Ves. Ill. 70.

284.

² Gibson v. Rees, 50 Ill. 383; Black v. Lusk, 69 Ill. 70.

³ For proper practice see Gibson v.

⁴ Gibson v. Rees, 50 Ill. 383, 406; Weightman v. Powell, 2 De Gex & S. 570; O'Callaghan v. Blake, 9 Irish Eq. Rep. 220; Lyndon v. Lyndon, 69 Ill. 43, 46.

error for the court "to proceed to further hear the cause upon additional proofs, without an answer, unless a rule has been laid on the defendant to answer."¹ It is always proper for the parties to stipulate that the answer to the original bill shall stand as an answer to the amended bill; but in a case where an amendment brings new issues into a case and prays additional and different relief than that designed to be secured by the original bill, the defendant should be permitted to answer it as amended.² Where an order of reference is set aside after the taking of testimony, either by direct order of the court, or as the result of allowing material amendments to the bill, the parties should always stipulate that the evidence already taken may be used upon a re-reference. If the order of reference is not set aside, but the hearing simply suspended until the amendment is made, the amendment being as to a formal matter only, a different rule obtains. Thus it was held that where the pleadings were amended during the progress of the reference, without setting aside the order of reference, but suspending the hearing for that purpose, and where the issues remain essentially the same, the master may refuse leave to re-examine the witnesses *de novo*.³ Where a bill in chancery is amended after a hearing as to a formal matter which is not the subject of proof, the case will not be re-opened to let in new and additional proofs.⁴

XIV. ARGUMENT OF COUNSEL

§ 312. Argument of counsel—Importance of.—One of the most commendable qualities of a judge is to be a patient listener. He may be gifted with quick perceptions and a faculty of arriving at conclusions rapidly, and may thus be enabled to anticipate the result of a proposition, or argument which is being elaborated unnecessarily by the patient, plodding attorney before him, as he proceeds, step by step, from "firstly" to his "tenthly," and the temptation may be great on the part of the court to intimate that the court fully under-

¹ Gage v. Brown, 125 Ill. 522.

Adams v. Gill, 158 Ill. 190, 41 N. E. 738.

² Bauer Grocer Co. v. Zelle, 172 Ill. 407, 413, 50 N. E. 238; Gage v.

Brown, 125 Ill. 522, 17 N. E. 754;

³ White v. Smith, 1 Lans. 469,

⁴ D'Wolf v. Pratt, 43 Ill. 193, 21

stands him and to proceed to the next branch of his subject; yet it is within the common observation of all, that no time is saved by such a course; that, as a rule, it only discomfits counsel by breaking the thread of his argument, and that, after vainly beating about for a time, he begins again where he left off and plods on in his own way to the end. This result is almost certain if he is one of the old "wheel horses" of the profession, but if he happens to be a young man such an interruption may and often does so embarrass him as to prevent him from proceeding farther with any satisfaction to either himself or the court. Another practice indulged in by some judges is to repeatedly interrupt counsel with questions, so put as to indicate that in the mind of the court such questions are unanswerable if the position of counsel be correct. Sometimes the habit is prompted by a little vanity on the part of the court. He may know more, or may think that he knows more, of the subject than the counsel who is making the argument, and, prompted by a desire to make a display of his superior knowledge, such interruptions are indulged in. But, whatever be the motive prompting such interruptions, it is far better to allow counsel to proceed with his argument to its conclusion, and then, if any points have been overlooked upon which the court in good faith desires information, call attention to the same in such a way as to assure counsel that his assistance is really desired. Lord Hale, one of the greatest chief justices England ever produced, refrained from forming his conclusions until the evidence was all in and the arguments completed. His rule upon this subject was:

"That I suffer not myself to be prepossessed with any judgment at all, till the whole business and both parties be heard." Not only this but he was a patient listener. His biographer, Bishop Burnett, says of him:

"Nothing was more admirable in him than his patience; he did not affect the reputation of quickness and dispatch, by a hasty and captious hearing of counsel; he would bear with the meanest, and gave every man his full scope, thinking it better to lose time than patience."¹

Upon the installation of Justice Hutton as judge of the com-

¹ Burnett's Life of Sir Mathew Hale, pp. 29, 30.

mon pleas, Lord Bacon, in advising him as to the discharge of his official duties, among other things said:

"Affect not the opinion of pregnancy and expedition by impatient and catching hearing of the counselors at the bar."

If time is precious and the court should and must economize, let it be done by curtailing prolixity in the examination of witnesses and preventing the waste of time in unnecessary details, but, when it comes to the argument, give counsel full and ample time to present his case in his own way, unembarrassed and unhampered by interruptions or questions, and the judge feels, as he gathers up his books and papers, that the court understands and appreciates his position, and that, whatever the finding of the court may be, it represents the intelligent and honest convictions of the judge.

At the conclusion of the taking of testimony it is usual in the case that counsel are not ready to proceed with the argument of the cause at once, but require some time to be given for the making of abstracts of the evidence, and in preparation of briefs. Especially is this true in complicated cases, where months, and sometimes years, have intervened between the first hearing and the last, and the testimony covering, perhaps, thousands of pages, besides voluminous account books. Of course the master in his discretion may, and should, allow reasonable time for preparation. In New Jersey it is provided by chancery rules that the argument of a cause or matter may be had at the discretion of the vice-chancellor, or master, either immediately upon the closing of the testimony or on some future day to be fixed.² This rule, however, is wholly unnecessary, as the master has full discretion in the matter without

XV. IRREGULARITIES IN PROCEEDINGS — HOW CORRECTED

§ 313. Irregularities in procedure in the master's office. During the progress of a hearing in the master's office he is called upon to make various rulings relative to the admissibility of evidence and other matters, all of which rulings are subject to revision by the court or chancellor, at the instance of any party dissatisfied therewith; but the practice re-

¹ 8 Campbell's Lives of Ld. Cha., p. 116. ² N. J. Ch. Rules, Nos. 199,

to the preservation of objections and exceptions, and the time and method of presenting the same, is not uniform.

The time and method of correcting irregularities of procedure occurring upon a reference we now propose to discuss under the following headings:

First. The preservation of proper objections and exceptions.

Second. The time of presenting the same to the court or chancellor.

Third. The method of presenting the question to the court or chancellor; and,

Fourth. The action of the court or chancellor.

First. Let us examine the proper method of preserving objections and exceptions to the action of the master.

The rule is universal that a party cannot complain of errors in procedure where he has consented to the same, either expressly or by implication, as by a failure to object at the proper time. If a party is present in the master's office at the taking of testimony and makes no objection to the form in which it is taken, he will not be permitted afterwards to call in question the correctness of the same.¹

Not only must the party object at the proper time, but the evidence thereof must be preserved in some manner, in order to be availing. Under a previous heading of this chapter the method of preserving objections and exceptions to rulings of the master, made during the progress of a hearing, has been fully examined, leaving but little to be added in this connection:²

We there saw that there are three methods of preserving objections, rulings of the master, and exceptions taken thereto:

First. By proper entries in the master's minutes of proceedings.

Second. By a bill of exceptions.

Third. By being embodied in the master's report.

We there saw also that in Illinois and in the federal courts, and generally, no other record is required to be made of proceedings before him than that which is contained in these minutes; and that in Pennsylvania and in Indiana a referee or master is authorized to sign and seal bills of exceptions containing such parts of proceedings before him as may be required by counsel; also, that in those states and in California, objec-

¹ Johnson v. Meyer, 54 Ark. 487, 440, 16 S. W. 121.

² See ante, § 290.

tions, rulings thereon, and exceptions taken thereto, may be embodied in the master's report; and that in Arkansas it is provided by statute that the master shall state such matters in his report when requested so to do by counsel. It was there also shown that the burden rests upon the party objecting to see that such objections, rulings and exceptions are properly preserved by one or the other of these methods, according to the practice of the court. This is a rule of almost universal application, where a party is complaining of an alleged error and desires to properly lay a foundation for a court of review to correct the same.

§ 314. Time of presenting question to the court.—The foundation being laid for presenting the question to the court as to the regularity of the action of the master, the next question is as to the *time* when a party must appeal to the court or chancellor, and in this there is anything but uniformity, viz: as to whether such appeal should be made at once or wait till the coming in of the master's report. In the first instance the master is required to suspend his proceedings while the party objecting takes his record at once to the chancellor, who hears the objection and either approves the action of the master, or reverses his rulings and gives him further directions. In the other case the party dissatisfied with the master's rulings simply sees that the record is properly made up for review and waits until the report is returned into court to present the matters for review. Each has its advocates, who do not fail, as will be seen below, to give good reasons in support of their preference. Hoffman, in his *Chancery Practice*, published in 1842, says that "the practice, as stated in my former work (Hoffman, *Masters in Chancery*, 58-60), as to the mode of correcting the master's decision in the admission or rejection of testimony, is, I believe, unchanged."¹ Upon turning to the work referred to we find that the English method of correcting errors committed by the master, either by refusing to receive proper evidence when offered, or by the admission of improper evidence, is by appealing at once to the chancellor, and not by exception upon the coming in of the report. If the master refuses to receive proper evidence, or to permit the examination of a competent witness, a motion under this practice should be

¹ Hoffman, Ch. Pr. 541.

made immediately to compel him; and where the irregularity complained of is the admission of illegal testimony, a motion should be made at once to suppress the deposition, or for an order directing the master not to consider such evidence.¹ The master of the rolls, in a certain case, said: "I have looked into the book which Mr. Deaves has made of such points of practice as he deemed worthy of being preserved. It contains innumerable orders for the suppression of depositions before the master."²

In commendation of this practice of applying immediately to the court to correct irregularities in the master's office, instead of waiting till the coming in of the report, Hoffman says: "It appears to me clear, that in general the expense and delay will be much less by resorting to a motion immediately. The rejected evidence will probably be such as will materially affect the report, and if an exception is taken and allowed, the case must be sent back to the master to receive it, and his report again brought before the court."³ But if the motion is at once made upon the commission of the error, the competent evidence rejected by the master is directed to be admitted and considered by him, or the illegal evidence admitted is ordered suppressed or to be rejected and not to be considered in making up his report. Under the practice in Illinois, where the master improperly rejects competent testimony, counsel dissatisfied with the master's ruling must at once, before the master makes his report, take the question before the chancellor and procure his ruling thereon. If the latter holds that the evidence should be admitted the master will then receive the evidence and pass upon it in making up his report. It is not proper practice to wait until the master's report is filed and then except to his rulings. Counsel will not be permitted to speculate on the findings of the master.⁴

§ 315. Time of presenting question to the court — Continued.— The decisions of the Illinois courts, referred to in the foot-note to the last section, are based on a rule of both

¹Smith v. Althus, 11 Ves. 564; Wil- 608; Vaughan v. Lloyd, 1 Cox's Cas.
lan v. Willan, Cooper's Cases, 291; 812.

Hough v. Williams, 3 Brown's C. C. ³Hoffman's Masters in Ch. 59.

190; Redifer v. O'Brien, 3 Mad. R. ⁴Dickinson v. Torrey, 91 Ill. App.
43. 297, 304; Brueggstradt v. Ludwig,

²Parkinson v. Ingram, 8 Ves. 608, 184 Ill. 24, 28, 37, 56 N. E. 419.

the circuit and superior courts at Chicago, and, therefore, may not apply in other courts of the same state where no such rule obtains. The rule referred to is as follows:

"Whenever such reference is made to a master in chancery of this court, to take testimony and report the same, or to take testimony and report the same with his conclusions thereon to the court, the master shall have full power and discretion to pass upon all questions of competency of witnesses, and the propriety and relevancy of all questions or interrogatories put by counsel, and the master shall note his ruling upon each objection in the minutes of the proceedings before him, and when a master has ruled that a party or witness shall answer a given interrogatory, it shall be the duty of such witness or party to answer in the same manner as if such witness or party had been so directed by the court; and in case the master shall hold that any question is irrelevant or incompetent, the same shall not be answered. If either party shall except to the ruling of the master upon the admissibility of testimony or evidence, they shall, after the testimony and evidence before the master is closed, and before he makes his report thereon, bring such objections and exceptions to the master's ruling upon the testimony before the court, and if the court shall sustain the ruling of the master, he shall immediately proceed to make his report upon the testimony and evidence submitted to him, and if such objections and exceptions to the rulings of the master shall be sustained, the master shall proceed to take such further testimony as the court may direct, and shall disregard, in making up his report, such testimony as the court may rule to be incompetent or irrelevant."¹

Yet, under these rules, the hearing of objections to the rulings made by the master upon the admissibility of evidence may be continued until the coming in of the master's report upon the whole case.² If it should then appear that the master rejected evidence which he should have admitted the cause should be re-referred with directions to admit the testimony.³ In a Michigan case it is said that when a witness is improperly

¹ Brueggestradt v. Ludwig, 184 Ill. 24, 28, 56 N. E. 419.

² Id.

³ Id., p. 37.

rejected, the testimony he might have given is not taken into account by the master in making up his report, nor is it by the court in reviewing on exceptions the correctness of the conclusions the master has come to from the evidence before him. The court will not hear evidence that was not before the master, nor undertake to decide a different case, or what the master's report should have been on a different state of facts.¹ For this reason it is there held that where a master has erroneously refused to receive testimony offered before him, a motion should be made before the chancellor requiring him to receive it. This should be done immediately, and without waiting for him to make his report; and the master, at the request of either party, should make and deliver to such party a certificate stating briefly the facts of the case, with his reasons for rejecting the testimony, that the court may review his decision with as little delay as possible.²

§ 316. Time of presenting question to the court—Continued.—It has been the constant practice in this country for many years, when a party conceives that the master has erred in the progress of a reference, by the rejection of proper evidence, to appeal at once to the court, without waiting for the coming in of the master's report, and ask the court to set aside the alleged erroneous rulings.³ An erroneous ruling of the master as to the principle upon which an account should be taken, under the practice in the chancery court of the province of Ontario, may be corrected by at once appealing to the chancellor, without waiting for the master's report.⁴ So, also, a creditor whose claim has been disallowed by the master is not compelled to await the general report, but may at once obtain a certificate of disallowance and appeal from the master's rulings.⁵ Yet such appeals from masters' rulings, during the

¹Schwarz v. Sears, Walk. Ch. (Mich.) 19, 22.

²Schwarz v. Sears, Walk. Ch. (Mich.) 19, 22; Hoffman, *loc. cit.*

³McDonald v. Wright, 12 Grant's Ch. R. 552, 556, 559. The court say that "The English practice, which is of course binding on us as far as it is applicable, affords some examples of applications bearing some analogy

to the present, which have been entertained by the court during the progress of a reference." The English cases cited are: Brace v. Ormond, 1 Mer. 409, 412; Cotton v. Harvey, 12 Ves. 391; Jones v. Powell, 1 Sim. 387; Routh v. Tomlinson, 16 Beav. 251.

⁴Court v. Holland, 29 Gr. Ch. 19.

⁵Re Clagett, Fordham v. Clagett,

progress of a hearing, will not be readily allowed, even though the court be of the opinion that he might have taken an opposite view.¹

§ 317. **Time of presenting question to the court—Continued.**—In most of the federal courts the practice is just the opposite. Except in extreme cases, to be noted hereafter, the whole responsibility is thrown upon the master, and as a rule all questions reserved until the coming in of the master's report. Except in rare cases the court will refuse to correct errors of procedure during the progress of a hearing, but dissatisfied parties must wait till the coming in of such report, reserving their rights by proper objections and exceptions during the hearing.² It is not the practice in these courts to correct errors, made during the progress of a hearing in the master's office, by motion before the chancellor, but proper objections should be made and noted by the master and the question thus preserved to be passed upon at the final hearing. For example, if a question propounded to a witness is objected to, the objection should be noted by the master and the witness required to answer if the objection is overruled, unless the question of privilege is raised by the witness. The propriety of the master's ruling is thus preserved to the final hearing.³ The judges of those courts place a high estimate upon the ability and integrity of their masters, and believe that their usefulness to the court will be increased by allowing the responsibility of their action to rest upon them, at least in the first instance. Judge Jenkins, of the United States court of appeals, speaking for the court, says: "The master is an officer of the court. He is appointed by and should be selected by the court, and not by the parties. The office is one of dignity and responsibility, and, while it is proper that the master should receive from the parties in interest all proper suggestions with reference to the manner in which he should comply with his duty, it still remains that he must determine for himself how his duty should

20 Ch. D. 637, 46 L. J. (N. S.) 70; Wood v. Brett, 9 Gr. Ch. 452; Holmsted & Langton's Judicature Act of Ontario, p. 858.

¹ Sculthorpe v. Burn, 12 Gr. Ch. 427.

² Lull v. Clark, 20 Fed. 454; Bate Refrigerating Co. v. Gillette, 28 Fed.

673; Union Sugar Refinery v. Mathieson, 8 Cliff, 146, Fed. Cas. No. 14,306; Wooster v. Gumbirner, 20 Fed. 167; Hoe v. Scott, 87 Fed. 220.

³ Maxim-Nordenfelt Guns & Ammunition Co. v. Colt's Patent Firearms Mfg. Co., 108 Fed. 39.

be performed, and he owes it to the court that its orders should be carried out strictly and impartially, and not in favor of one interest against another. He occupies a *quasi-judicial* position. He is not the servant of, nor bound to obey the orders of, any parties to the suit; and he should not become a mere dummy, to be used by interested parties to effect their purposes."¹ In another case it is said that the master is a judicial officer, acting as the representative of the court which appointed him, and while there can exist no doubt of the power of the court, for sufficient cause, to vacate or modify any order made by him, it is not the general practice for the court to interfere with proceedings *in limine*, but to wait until the coming in of the report before hearing exceptions by either party to the cause to any irregularity or excess of authority on his part.²

§ 318. Time of presenting question to the court — Continued.— Under the practice in these courts, as it is said in another case, the master "occupies for the time being the position of the court, and is not to be continually interfered with while discharging his duties to the best of his ability. It would create intolerable delays and confusion, besides putting an unnecessary burden upon the court, to hold that each time the master makes a ruling the aggrieved party may, by special motion, have it reviewed. The orderly, and it seems the generally accepted, procedure is to present all the questions arising before the master by objections and exceptions to his report."³ In a more recent case Mr. Justice Kirkpatrick urged the following reasons in support of the practice in the federal courts:

"The court appoints the master with special reference to his fitness to perform the duties imposed upon him. He is the court's representative, and it is his duty to pass upon all the questions of procedure as they come before him. His action is subject to review of the court, but it must be only when he has concluded his labors and the court has before it all the data upon which his conclusions are founded. The duty of the master is to hear the parties fully, 'directing the mode in which the matters requiring evidence shall be proved before

¹ *Finance Co. v. Warren*, 53 U. S. (U. S. Cir. Ct. Dist. N. J.), 28 Fed. App. 472, 82 Fed. 525. 673).

² *Bate Refrigerating Co. v. Gillette*

³ *Lull v. Clark*, 20 Fed. 454.

him,' as provided for in the seventy-seventh rule in equity. It is necessary that he should be given the power to avoid delays and confusion, and to relieve the court of the necessity of passing upon the materiality of every disputed question as it may arise in the progress of the hearing. Errors made by the master can be corrected upon the coming in of his report upon exceptions properly taken. . . . It would be productive of interminable delay and much vexation if all the disputed questions before the master should, as they arise, be brought before the court for revision and approval. 'The court may, but rarely will, interfere with the master's rulings before his report is brought before it for review.'¹ Reference to the court as each question arises is improper."² This was on appeal to the court to strike out certain portions of testimony admitted by the master. The motion was disallowed and the question deferred until the coming in of the master's report.

In a case where a party desired to put in evidence that was not strictly in rebuttal, but tended to prove his case, as made in his opening, more fully and specifically, the court, on motion to compel the master to receive it, said that whether the evidence should be admitted or not must, at least in the first instance, rest in the sound discretion of the master. The 77th rule in equity provides that he shall regulate all the proceedings, and shall have full authority "to direct the mode in which the matters requiring evidence shall be proved before him." These provisions must include the order of putting in evidence that would, at any stage of the proceedings, be lawful and competent, and which would not deprive either party of a substantial legal right.³

§ 319. Time of presenting question to the court — Continued.—After the order of reference has been entered under the practice in these courts, we see that the cause is at rest until the coming in of the master's report. "The master may report back the cause to the court at any time when he has completed his investigations; and it is the duty of the clerk to allow him to file his report without any new order from the court, as the right to do so is implied from the decree, referring

¹ Foster's Fed. Prac., § 812.

² Wooster v. Gumbirner (U. S.

³ Hoe et al. v. Scott (U. S. Cir. Ct. Cir. Ct. S. D. N. Y.), 20 Fed. 167. D. N. J.), 87 Fed. 220.

the cause to him for the purpose specified in the decree." In those courts all objections to the admission or exclusion of evidence are made before the master, but are not passed upon until the coming in of the report. The practice of certifying such matters to the court during the progress of the hearing, and taking judgment thereon, is not followed.

In passing upon this question Justice Clifford says:

"We are not now deciding that the court might not have the power to revise each act of the master as it progressed, provided it was referred back in a formal report by the master. But we do decide that such a practice would be productive of great delays, and will not receive any countenance from the court. . . . The power of the court to revise any and every irregularity before the master is full and ample, and can in our view of the matter be best exercised when we have them before us with the whole case. Take any litigation of this volume in evidence and pleadings and it would be quite difficult for the judges to decide an isolated point to their own satisfaction without looking at the whole or nearly the whole record; as the consideration of one point necessarily must have a bearing, greater or less, upon other parts of the same record."¹

The same rule obtains in New Jersey, where it is held not to be good practice to suspend an examination before a master to enable the court to pass upon the competency of evidence.²

While the general rule in the federal courts is that all questions as to the regularity of proceedings in the master's office will be deferred to the coming in of the master's report, and that, during the progress of a hearing, the court will decline to instruct the master as to his duties,³ yet the power of the court to do so is unquestionable, and the duty of the court so to do, in case of extreme hardship, recognized. Thus in one case it is said that it is only in a case of extreme hardship that the court should be asked to review an incidental ruling of the master, made in the course of a hearing, which can be reviewed upon exceptions to his report. It is more judicious to require the hearing to proceed in the ordinary

¹ *Union Sugar Refinery v. Mathieson*, 8 Cliff. 146, Fed. Cas. 14,898.

² *Rusling v. Bray*, 87 N. J. Eq. 174.

³ *Lull v. Clark*, 20 Fed. 454.

way. When the report is made, if it is excepted to, his findings of fact will appear, and the court can then review them intelligently, and with a stronger probability of reaching a correct result than if made during the hearing.¹

§ 320. **Method of presenting question to the court.**— Having preserved proper objections and exceptions to the rulings of the master, and having determined the time for presenting the same to the court, according to its practice, the next step for investigation is the proper method of presenting the same. The first thing to be done is to convey to the court, or chancellor, information as to what has transpired in the master's office. This must be done in writing and properly signed and certified by the master. It may be:

First. By the master's certificate.

Second. By a bill of exceptions, signed or sealed by the master or referee.

Third. By the master's report.

Whether counsel should resort to one or the other of these methods depends on the practice of the court, as regulated by its rules or by statutory provisions.

In jurisdictions where all irregularities are required to be corrected during the progress of a hearing, as is the practice in some of the states, but not in the federal courts where such corrections are generally deferred till the coming in of the report, as we have already seen, this is done by a certificate of the master, setting out the matter complained of in detail, to wit: the matter under investigation, the objections of counsel, the rulings of the master, and the exceptions taken, together with any other matter necessary to enable the parties to present the question to the court, or for the court to properly pass upon the same.

Even in the courts where, practically, all questions as to procedure are reserved to the coming in of the report, there are some matters which, as we have already seen, necessarily form exceptions to the rule, such as the refusal of a party or witness to obey an order of the master made during the progress of a hearing. Such matter must, of course, be presented to the court at once, and the facts, whatever they may be, must be

¹ *Welling v. La Bau*, 32 Fed. 293, 295.

transmitted to the court by the certificate of the master. This is what is meant by "emergency matters," as referred to above by some of the judges. As to all matters that are reserved until the coming in of the report, according to the practice of the court a record thereof is transmitted to the court in the form of a bill of exceptions or embodied in the master's report;¹ or the matter may be transmitted from the master to the chancellor by a certificate, as above stated. Such is the course usually followed in the federal courts.

§ 321. Method of presenting question to the court — Continued.— The record having been properly made and filed in court, the next step in the procedure is the presentation of the question to the court or chancellor. This must be done either:

First. By a motion, or petition, or,

Second. By exceptions.

Which is the proper course to be pursued, in some cases, is a question which counsel will find very difficult of solution.

In courts where the practice requires irregularities to be corrected during the progress of a hearing there is no doubt about the first of the above methods being the proper course to be pursued; and in other cases, where the matter is regulated by statute, as in Arkansas, where the statute provides that exceptions to the rulings of a master must be stated in his report, and that upon the coming in of the report exceptions must be taken on the same grounds, there can be no doubt about the second method being the proper one; but, in jurisdictions where alleged errors are corrected upon the coming in of the report, and no rule of court or statute covers the practice, is where the difficulty arises, and where the decisions of the courts are at variance. An examination of the question is rendered still more difficult by the loose use of the terms "*objections*" and "*exceptions*" — judges in their opinions frequently using them as synonymous.

On principle, unless a rule of court or statute provides to the contrary, irregularities in procedure in the master's office should always be corrected on motion or petition, and exceptions should only be resorted to when a party desires to ques-

¹ As we have already seen, this is the practice in Pennsylvania, Indiana, California and Arkansas.

tion the correctness of the master's conclusions, or the findings, upon the matters submitted to him by the order of reference. This is well stated by Judge Stiness, of the Rhode Island supreme court, who, speaking for the court, says:

"Although there is some diversity of practice in different courts, which it is hardly worth while here to consider, we think the following rule will be found convenient, simple and reasonable: Where a party alleges wrong conclusions by the master upon the matters referred to him, the proper course is by exceptions to the report. But when the master proceeds irregularly, as by failing to give notice of hearing, or to consider some matter referred to him, or by refusal to hear testimony or to give opportunity for its production, the remedy may be by petition to set aside the report or to recommit it."¹

To the same effect the supreme court of Michigan say an exception can only be taken to the action of the master where it is a finding on the merits. So far as his errors consist of mere irregularities, they must be corrected by orders of the court obtained on motion of the party feeling himself aggrieved. Such irregularities cannot be corrected on exceptions; but the complaining party should apply to the court for the proper order requiring the master to correct his action in the particulars complained of.²

§ 322. Method of presenting questions to the court—Continued.—And again, in another case, as follows: When proceedings before a master have been irregular, the proper method of correcting the error is by an order of the chancellor procured on motion. The party complaining should apply to and obtain from the master, an extension of the time to file objections until the motion can be heard and decided, as an "exception to the report pending the motion would be a waiver of the irregularity."³ Mr. Justice Woodbury says: "It is, indeed, somewhat doubtful whether, strictly, any exceptions to

¹ Hall v. Westcott, 17 R. I. 504, citing Tyler v. Simmons, 6 Paige, 127; Ch. 19; Emerson v. Atwater, 12 Mich. 314.

Douglas v. Merceles, 24 N. J. Eq. 25; ²Suydam v. Dequindre, Walk. Ch. Emerson v. Atwater, 12 Mich. 314. (Mich.) 23, 25, citing Tyler v. Simmons, 6 Paige, 127.

³ Barnebee v. Beckley, 43 Mich. 613, 616; Schwarz v. Sears, Walk.

the master's rulings on the admission or rejection of evidence can be properly embraced in exceptions to the master's final report."¹

In disregard of this rule in a federal case, where it was contended that objections to the exclusion of evidence before the master could not be considered by the chancellor on exceptions to the report, but only on motion to recommit, the court ignored this contention and recommitted the report to the master, with directions to admit the excluded testimony;² but in a New York case it was held that objections to the admissibility of evidence before a master not made the ground of exception, on the report being filed, will be considered as waived, and could not be raised at the final hearing.³ This ruling is in direct violation of the rule as laid down in the same state in a more recent case.⁴

On turning to the leading case upon this subject — a decision rendered by Chancellor Walworth in New York in 1836, we find it stated that the filing of exceptions to the master's report is not the proper form to correct irregularities in the proceedings; that, if the proceedings have been irregular, or the master has neglected to decide and report as to any matter which he was by the order of reference directed to ascertain and report upon, the proper course for the party aggrieved is to make a special application to the court to set aside the report for irregularity in the proceedings, and to refer the case back to the master for a further report upon the matters originally referred to him for his examination and decision. It is there further held that such motion to set aside and re-refer, and the filing of exceptions to the report, are incompatible and entirely inconsistent with each other; that the filing of exceptions to a report necessarily presupposes that the report is regularly made, but that the master has come to a wrong conclu-

¹Troy Iron and Nail Factory v. Corning, 6 Blatchf. 828, 333, Fed. Cas. 14, 196. He adds that Daniell seems to sanction it, Chan. Pr. 1822, and then cites to the contrary, Schwarz v. Sears, Walker's Ch. 19; Ward v. Jewett, 45 id., and Tyler v. Simmons, 6 Paige, 127. Daniell says "that if the master improperly re-

jects evidence which has been tendered to him, it should form a specific subject of exception to his report."

²Daniell, Ch. Pr. (Perkins' ed.) 1499.

³Marks v. Fox, 18 Fed. 713.

⁴Minuse v. Cox, 5 Johns. Ch. 441, 447.

⁴Tyler v. Simmons, 6 Paige, 127.

sion as to the whole or some of the matters referred to him for his decision.¹

Notwithstanding these explicit statements of the principle upon which a court of chancery proceeds in the correction of errors of procedure arising in the master's office, we constantly meet with cases when the report of a master was referred to him for his consideration and correction, where no motion or application was made to the court for such purpose, but upon exceptions filed to his findings. This is done, probably, under the general power vested in the chancellor, who, when dissatisfied with the master's findings, may always set them aside and re-refer the cause to him for his further consideration. Indeed from the reported cases in federal courts one would come to the conclusion that the general method of correcting errors made by a master during the progress of a reference is not by motion or application to the court to set aside the findings, but on exceptions to the report. Yet it is submitted that the better course in all cases is to follow the rule so distinctly announced by Judge Stiness of Rhode Island and Chancellor Walworth of New York, and especially is this true in jurisdictions where it is held that filing exceptions to the report constitutes a waiver of irregularities.

§ 323. *The action of the chancellor.*— Upon application to the chancellor to correct an alleged error, or irregularity, occurring in the master's office during a hearing upon a reference, whether the question is presented by a motion, petition, or by exception, the chancellor must do one of three things.

First. Overrule the motion, petition, or exception, as the case may be, and approve the action of the master.

Second. Sustain the motion, petition, or exception, and re-refer the matter to the master with further directions.

Third. Concede the irregularity complained of, but make the correction, if he may legally do so, himself.

He may overrule the motion, petition, or exception, either on the ground that the action of the master was correct and proper; or that the error, if committed, was a harmless one — one not calculated to injuriously affect the rights of the party

¹ Tyler v. Simmons, 6 Paige, 127, 130-131.

objecting. In attempting to establish such an irregularity the burden is always on the party objecting to satisfy the court as to the truth of both propositions; that is, that error has been committed and that such error was a material one—one affecting the merits of the controversy.

Thus where the complaint is that the master improperly rejected the evidence of witnesses, the burden is on the objector to show that the evidence rejected is material and proper.¹ So if, on exception to a master's report upon the ground that he excluded competent evidence, it appears that the evidence offered had no sufficient bearing upon any issue involved in the case to be of any value, such exception will be overruled.² Nothing further need here be added upon this subject, as it is more fully discussed in a future chapter.³

XVI. SPEEDING THE HEARING.

§ 324. Speeding the hearing in the master's office—Unreasonable delays.—How to expedite matters in chancery and prevent the wilful waste of time resorted to for the sake of delay or wearing out an opponent, is a question that has troubled chancellors not a little. In an old work upon the "Abuses and Remedies of Chancery," written in the latter part of the reign of James I., we find the following pertinent remarks upon the subject: "It is evident, that motions are the source and original of references, and of those orders, which the last lord chancellor not unaptly tearmed interlocutory, being before hearing, and consequently of all confusion. For it hath ever been noted, that none will be so ready to move, as he that hath the worst cause; for he hath nothing else to trust to. If he cannot get his adversary on the hipp by some trick or other, in order or reference, and soe bring him to some hard composition, *actum est* with him. If he had not more hope of that than his cause, he would never have come unto the court. Whereas he that hath a good cause will never dwell upon these bye passages, but thinks every straw that lyeth in his way a timber logge, to hinder him from going on

¹ Bailey v. Myrick, 52 Me. 133, 138.

² Hall v. Otis, 77 Me. 122.

³ See "Harmless Error," *post*.

§§ 498, 499.

with speede to his hearing, that he may so obtain a decree and a good end of his business."¹

These unreasonable delays were doubtless the source of Sir Edwards Phillips' disinclination to refer any matter whatever to a master. This master of the rolls seems to have been so disgusted with references that he discouraged them upon every occasion, as we find it stated in the same paper, that, upon such applications being made, his invariable answer was — "I sitt not here to referr causes; they might have done that before they came hither; now they are here they shall know their doome."²

Anciently referring a cause to the master in chancery was called *committing* it. A standing jest of Lord Keeper Egerton, when he was master of the rolls, was to ask what the cause had done that it should be *committed*?³ Doubtless the point of this jest, aside from the play on the word *committed*, laid in the fact that such *committing* was to the cause itself practically the same as sending the parties themselves to the Fleet for an indefinite term. A writer in the New Jersey Law Journal, in speaking of the usual delays attending the grinding of contested cases through the master's office, with some degree of exaggeration perhaps, puts the case as follows: Whenever a cause necessitates the taking of testimony before a master or examiner, in nine-tenths of such causes the die is cast for litigants. Bonanzas for the equitable fraternity; sepulchres for the litigants. The evidence is strung out in a big round hand. A solitary day of the week is selected for the taking of testimony. On that day litigants, with all their witnesses, are there dressed for the occasion, for it is a big day for them; but some one, a counsel or the examiner, has a headache, or an earache; the cause is, therefore, adjourned out of deference to the ache; and when the testimony is at last started, days are often consumed in the pursuit of inconsequential matters. Of course there are rules requiring evidence to be taken in a certain time, but the solicitors consent these rules into a nullity.⁴ To increase the delay in the master's office he adds, every thing which counsel offers is admitted, "speaking with a slight tinge of metaphor, from the glories of the American flag back

¹ Hargrave's Law Tracts, p. 443.

² Id., pp. 428, 429, 447.

³ 2 Camp. Ld. Cha. 409.

⁴ 8 N. J. Law Jour. 295.

to the pre-Adamites, making nauseous swamps for the over-worked chancellor,"—all goes in under the master's oft-repeated ruling—"Let it go in subject to objection."¹

§ 325. **Speeding the hearing—Unreasonable delays—Continued.**—Various rules have been laid down at different times by the courts in order to expedite matters in the master's office, and to prevent the too frequent long delays between the order of reference and the return of the master's report to the court. Among these we find the following, entered by Lord Coventry, 1635: "The masters of the court shall prefix convenient, but not over long days for hearing such matters as are referred to them; and at the times prefixed, shall proceed without admitting any feigned or dilatory excuses, especially that counsel are otherwise employed, or cannot attend, or are not instructed, there having been notice and time enough allowed or the like; and after the days shall speedily send in their reports for the case of the client's attendance, which cannot but draw great charge."² Also the following rule laid down by the same authority: "The register shall, within ten days after the end of every term, certify to the lord keeper, what references depend in the hands of any master, and how long they have depended, that if any of them have depended over long, the court may require an account thereof from the master, and quicken him to a speedy dispatch."³

The long, tedious delay in the prosecution of chancery cases in England is barely mentioned by Blackstone, and that in an apologetic way, as follows: "Frequently long accounts are to be settled, incumbrances and debts to be inquired into, and a hundred little facts to be inquired into, before a decree can do full and sufficient justice. These matters are always, by a decree on the first hearing, referred to a master in chancery to examine; which examination frequently lasts for years; and then he is to report the fact, as it appears to him, to the court."⁴

§ 326. **Speeding the hearing—Unreasonable delays—Continued.**—In some jurisdictions the rules require, and in all it is within the discretion of the chancellor to provide in the

¹ 8 N. J. Law Jour. 294.

² Beames' Orders in Ch., p. 79.

³ Id., p. 81. In the Curs. Canc. 429.

we find the above rule recognized,

with the observation "that it was an ancient and usefull practice."

See also Wyatt's Pract. Reg. 865.

⁴ Com., vol. 3, p. 453.

order of reference, that the master proceed continuously in the master's office, or *de die in diem*, and, in such case, it is the bounden duty of the master to observe such order to the letter, wherever it is not absolutely impracticable. Unless this is done much of what may be said as to the superior fitness of the master's office for the taking of accounts loses its force. It too often happens that cases are permitted to slumber for months, or even years, in the master's office, without the parties being able to tell upon whom the responsibility rests. Chancellor Spragge, in applying the rule of his court to a case before him, said: "I do not at present see any reason why the taking of these accounts should not be proceeded with *de die in diem* and *de horæ in horam*; and if this be done it will afford a good illustration of the superior fitness of this court over a jury trial, or even an arbitration, for the taking of such accounts."¹

In 1800 the master of the rolls, Sir Richard Pepper Arden, held that no order was necessary to enable the master to proceed *de die in diem*, saying that, "Where the cause requires it, the master may, and it is his duty to, proceed *de die in diem* without an order."² But afterward, in 1805, it was settled by Lord Chancellor Eldon, that such an order was necessary, "but the master is not to conceive the order to be imperative upon him. He has complete discretion to avail himself of it, or not; as the circumstances passing before him, call upon him in the exercise of a sound discretion."³ In 1828, by order No. 58 of General Chancery Orders, "every master is at liberty without order to proceed in all matters *de die in diem*, at his discretion."⁴ The general equity order 664, of the Province of Ontario, provides that, as soon as the master has entered upon the hearing of a reference, he is to proceed to the conclusion thereof without interruption, where that is practicable; and where any reference cannot be concluded in a single day, the master is to proceed *de die in diem*, without a fresh warrant, unless he is of the opinion that an adjournment other than *de die in diem* would be proper, and conducive to the ends of justice; and when an adjournment is ordered, the master is to

¹ Falls v. Powell, 20 Grant's Ch. R. 454, 468.

³ Purcell v. M'Namara, 11 Ves. 362.

⁴ 2 Mad. Ch. Pr. 675; 2 Barbour, Ch.

² Sturdy v. Lingham, 5 Ves. 428.

Pr. 476, 477, and note to 11 Ves. 363.

note in book the time and reason thereof.¹ It has been held that it is the duty of the master to observe this order to the letter wherever it is not absolutely impracticable.²

§ 327. Speeding the hearing — Unreasonable delays — Continued.— In most of the courts in this country we find some general rule requiring the master to proceed with diligence upon a reference. United States Equity Rule No. 75, among other things, provides that, upon a reference, it shall be the duty of the master, as soon as he reasonably can, after the same is brought before him, to fix a time and place for hearing, give due notice thereof, and shall "proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings and to make his report, and to certify to the court or judge the reasons for any delay."³

Pennsylvania Equity Rule No. 17 provided, in substance, that if the parties fail to present the matter referred to the master for twenty days after such reference, the order appointing the master shall become null and void without further order. This same rule further provides that "the master, after such reference is brought before him, shall proceed without delay to hear the matter referred and make report thereon to court within six months, the master, however, having the right, with the written consent of the parties in interest or their attorney, to extend the time for a further period of sixty days."⁴ This rule further provides that the court shall not extend this time "except upon petition filed setting out proper cause therefor." In case such admonitions prove ineffectual the court may resort to harsher means.

It is the duty of the master, independently of any rule of court, to proceed in the reference with all reasonable diligence, and if unreasonable delay occurs the court may visit the punishment on him. He is an officer of the court, and as such is subject at all times to its orders. If the business of the master is such that he cannot proceed with the reference with reason-

¹ Holmsted & Langton's Judica- graph 77, contains the same provision. Act, 825.

² Falls v. Powell, 20 Gr. Ch. 468.

⁴ Hoofstittler v. Hostetter, 173 Pa.

³ Florida Eq. Rule No. 24, para- St. 575, 577, 83 Atl 753.

able dispatch, the court should set aside the order of reference and send the case to some master who has time to attend to the duties of his office.¹ Anciently, if the fault rested with the master, the reference was not only revoked, but the master was also rebuked, as we see by Lord Coventry's order, A. D. 1635: "If the master do use or willingly admit any gross delay, the reference is to be removed, and the master rebuked by the court."² If the fault rests with the complainant, he may be punished therefor by having the prosecution of the reference taken from him and committed to the other party.

§ 328. Speeding the hearing — Unreasonable delays — Continued.— It frequently happens that the party who procures a reference to a master and who is charged with its prosecution is interested in delaying the proceedings as long as possible, and for that reason fails to carry the reference into the master's office, or permits the matter to drag afterward. The remedy therefor is to apply to the court by motion to have the prosecution of the reference taken away from such party and to have it committed to the party aggrieved by such delay;³ or the punishment visited upon him may be still more severe. Thus, a cause may be properly dismissed for want of prosecution. The very failure to prosecute may consist in a failure or refusal to proceed in the master's office. The appellate court of Illinois said: "We are by no means prepared to say that the dismissal of a bill in chancery for want of prosecution while the cause is pending before the master may not, under certain circumstances, be entirely proper. The failure to prosecute may consist in a failure to proceed before the master, and more than the mere fact that a reference is pending is necessary to show that such dismissal is error."⁴

Probably the most effectual means to secure promptness in the master's office, and avoid the unreasonable and vexatious delays usually attending a reference, is to provide by statute or by rule of court that the hearing before the master shall begin within a given period after the order of reference is entered, and proceed continuously from day to day until it is

¹ *Forrest v. Forrest*, 8 Bos. (N. Y.) 650, 655.

² *Bacon's Orders* (A. D. 1618), No. 18 in *Beames' Orders*, p. 80.

³ *Quackenbush v. Leonard*, 10 Paige, 181, 185; *Holley v. Glover*, 9 Paige, 2.

⁴ *Gordon v. Gordon*, 25 Ill. App. 810, 812.

finished; in short, that it shall proceed precisely as a trial before the chancellor, or in a court at law. In Pennsylvania provisions are made by the supreme court equity rules against any unnecessary delay in the proceedings upon a reference. The trial is conducted continuously from day to day precisely as a trial in court before the chancellor. Short periods of time are allowed for each step in the proceedings, and, in short, every possible precaution taken "to speed the hearing."¹

The chancery rules of New Jersey governing a hearing before a master, if strictly enforced, are calculated to prevent the tedious and unnecessary delays usually encountered. They provide that the examination of the witnesses on both sides shall be continuous, and that, when a stenographer is employed to take down the testimony, such examination shall proceed as rapidly as counsel can ask, and the witness answer, the questions. Counsel are not permitted to take notes, but every effort must be made to expedite the cause; in other words, a hearing must be conducted precisely "as at a trial at law before a jury."²

§ 329. Speeding the hearing — Recapitulation.—We thus see that from the earliest history of references to masters down to the present time, courts, counsel and parties have had reason to complain of the great and unreasonable delays connected therewith, and that, during all that time, the ingenuity of chancellors has been taxed to find some means to expedite the business of the office. Some of the means that have been resorted to are given above, which may be recapitulated as follows:

First. To provide in the order of reference that the master shall make his report within a certain time named by the court.

Second. To provide by a rule of court that the order of reference shall become null and void unless the parties proceed before the master within a limited time, and that the master's report shall be returned into court within a certain period thereafter.

¹ Brewster, Eq. Pr., § 5177. The rule referred to is a model one, well calculated to avoid unnecessary delays in the master's office, and it would be well for the chancery court in other jurisdictions to adopt substantially its provisions.

² N. J. Ch. Rules, Nos. 196, 197.

Third. To provide by a rule of court that the register or clerk shall certify at regular intervals what references are standing to masters and how long, "that the court may quicken them to dispatch where the reference has depended over long."

Fourth. To provide by general rule that in case of "gross delay" the reference be revoked and the "master rebuked by the court."

Fifth. To provide by general rule that the master proceed with diligence and with the least practicable delay, and that either party may apply to the court for an order to speed the proceedings and make his report.

Sixth. In case of unreasonable delay in the master's office the defendant may move to dismiss the cause for want of prosecution.

XVII. CONTEMPT OF MASTER'S AUTHORITY.

§ 330. Master as representative of the court.— In a previous chapter the relation of the master to the court was fully discussed. We there saw that he is an officer of the court, that his office is termed "an extension or branch of the court," that he is frequently styled the "arm of the court," and that, while acting under the orders of the court, his act is that of the court or chancellor; in other words, while so acting he is a chancellor *pro hæc vice*.¹ It follows, therefore, that any improper interference with him, while engaged in the discharge of his duties, constitutes a contempt of court. Whatever orders are made by him, while acting under the authority of the court, are the same as made by the court.² Any act or conduct in the master's office, which would be a contempt of court if committed upon a hearing before the chancellor, is a contempt of court; so too the refusal to obey any lawful order of the master made in a cause submitted to him is a contempt of court and may be punished accordingly. Any insult or outrage committed in the master's office is a contempt of court, precisely as if the act took place in the court room, in the presence of the chancellor. The master may of his own mo-

¹ See "His Relation to the Court," ante, § 115.

² *Bridges v. Sheldon* (U. S. Cir. Ct. Dist. Vermont), 7 Fed. R. 17, 45, 46.

tion, or upon the request of any aggrieved party, certify the facts to the court, upon which an attachment will be issued.¹

The same protection extends to all other officers of the court. Attorneys, while in attendance before a master or referee, "are as much under the protection of the court from violence, insults and threats as any other official."² All subordinate officers of the court, while engaged in the discharge of official duties, are entitled to the protection of the court, and while this is true it follows that attorneys, parties, witnesses, jurors and other officials are subject especially to the "power of the court to compel them to behave themselves with propriety in such matters as pertain to the business of the court in all its ramifications."³ In their official relation to the case counsel for both parties are "under the protection and privilege of the court, while engaged about the business of the court, from all contumely, insult and violence toward each other."⁴ In the case cited *Hammond, J.*, says: "Lord Eldon was asked to commit a solicitor's clerk for the breaking open of the desk of another clerk in the office of the register of the court. He said: 'These officers are a part of the court itself; and if the register does not come forward the clerk has a right to protection in his own behalf.'"⁵

§ 331. Master as representative of the court — Continued.— A messenger in bankruptcy was protected while on ship-board in charge of the goods.⁶ It is a contempt to insult a suitor and his solicitor while attending in the master's office, and the party will be attached at once on production of the master's certificate.⁷ A party was committed for terrifying a witness about to be examined at a commission.⁸ In Pennsylvania an examiner has power to punish a witness for contempt in refusing to obey his order, because it is a contempt of the

¹ *French v. French*, 1 Hogan, 138. p. 186, §§ 30, 31; *Weeks, Att'ys*, 180,

² *United States v. Anonymous* 188.
(U. S. Cir. Ct. W. D. Tenn.), 21 Fed. R. 761, 772.

⁴ *United States v. Anonymous*, *supra*.

³ *Id.*, citing *Ex parte Garland*, 4 Wall. 333; *Ex parte Bradley*, 7 Wall. 364; *Ex parte Paschal*, 10 Wall. 438; *Ex parte Wall*, 107 U. S. 265; s. c., 2 Sup. Ct. R. 569; *Re Woolley*, 11 Bush, 25; *Ex parte Cole*, 1 McCrary, 405, Fed. Cas. 2,973; 5 Crim. Law Mag.,

⁵ *Ex parte Burrows*, 8 Ves. 535.

⁶ *Ex parte Dixon*, 8 Ves. 104.

⁷ *French v. French*, 1 Hogan, 138; *Ex parte Ledwich*, 8 Ves. 598; *Ex parte King*, 7 Ves. 312.

⁸ *Partridge v. Partridge*, Toth. 40.

process and not of the officer;¹ and in New York the refusal of a witness to answer the grand jury is a contempt "in the presence of the court."² Any contempt against commissioners deriving their authority from the great seal is punished by the great seal.³ Therefore a commitment was made with rule *nisi* for an assault upon the messenger of the great seal while in the discharge of his duty, which was a contempt of the court.⁴ This shows that it was upon the same footing as a contempt of the face of the court.⁵ A party attending before a master or an arbiter substituted for the master, is entitled to protection. A peer, ordinarily privileged, for abducting a ward of court, was committed "for obstruction to the process of the king's court and contempt in the nature of obstruction to the king's court."⁶ A member of parliament was committed to the Fleet for sending a threatening letter to a master before whom he had a case pending, in which he was a party, counsel and the house of commons held he was not privileged. . . . These cases show that such contempts are as aggravated as those directed at the court itself in open court. . . . The privilege of protection to all engaged in and about the business of the court from all manner of obstruction to that business from violence, insult, threats, and disturbance of every character, is a very high one, and extends to protect the person engaged from arrests in civil suits, from service of process. It "arises out of the authority and dignity of the court," and may be enforced by a writ of protection, as well as by punishing the offender for contempt. A master, examiner, referee or commissioner acts under the authority of the court when he makes a lawful order, and the order need not be a written one.

§ 332. In what contempt consists.—The mere place where the act is committed is of no importance. A contempt of court may be committed upon the public highway, or anywhere else, and may be a thousand miles away from the place where the court is sitting, even beyond the actual territorial jurisdiction of the court proper. For example, in *Bate Refrigerator*

¹ *Com. v. Newton*, 1 Grant, Cas. 453.

² *People v. Hackley*, 24 N. Y. 74.

³ *Com. v. Hicks*, 1 Dick. 61.

⁴ *Elliot v. Haimarack*, 1 Mer. 802;
Ex parte Clarke, 1 Russ. & M. 563.

⁵ *Moore v. Aylet*, 2 Dick. 780.

⁶ *Wellesley's Case*, 2 Russ. & M. 1.

⁷ *Charlton's Case*, 2 Mylne & K. 1.

⁸ *Bridges v. Sheldon*, 18 B. & F. 295, 7 Fed. R. 17, 42, 45.

*Co. v. Gillette*¹ it was held that the master in chancery of the United States circuit for the district of New Jersey properly adjourned the taking of testimony in that case to St. James' Hotel, London, England. Now, there is no question but any act committed in the presence of the master while taking the evidence in said cause would be as much a contempt of court as if the same act had been committed in the court while engaged in hearing the evidence in open court and the contempt had been committed in its presence. Any resistance of the power of an officer of the court, while engaged in the discharge of his official duty, is an obstruction of justice, and punishable as a contempt of the court itself. Thus, in a case where an officer in attempting to make service upon a party "was beaten and made to eat the process and its seal,"² it is said that "the impediment to the efficient administration of justice is quite as direct in its operation to that end, happen where it may, as if the party had ridden his horse to the bar of the court and dragged the judge from the bench to beat him."³

The conduct of a party may constitute contempt of the authority of the court although not so actually intended. For example, in a case cited above one of the defendants went to Iowa to attend the taking of depositions, under order of the master, and while there the other party caused a summons to be served on him in the state court for the same cause of action. This was held to be contempt of court, and the federal court refused to permit any further proceedings until evidence of the discontinuance of the suit in the state court was filed.⁴

§ 333. In what contempt consists — Continued. — The reason of the rule securing immunity to witnesses, suitors and others is well stated in a New Jersey case where the court say: "Courts of justice ought everywhere to be open, accessible, free from interruption, and to cast a perfect protection around every man who necessarily approaches them. The citizen in every

¹ 38 Fed. R. 678.

S. Cir. Ct. W. D. Tenn.), 21 Fed. R.

² *Williams v. Johns*, 2 Dick. 477; 761, 769.

³ *a. c.*, 1 Mer. 302, note d.

⁴ *Bridges v. Sheldon* (U. S. Cir. Ct.

United States v. Anonymous (U. Dist. Vt.), 18 Blatchf. 295, 7 Fed. R. 17, 45, 46.

claim of right which he exhibits, and any defense which he is obliged to make, should be permitted to approach them only without subjecting himself to evil, but even free from any embarrassment or hindrance."¹ Judge Owen of the Ohio supreme court states the reason forming the basis of the rule more strongly. He says: "This question is one which more foundly concerns the free and unhampered administration of justice in the courts. That the suitors should feel free to appear safe at all times to attend within any jurisdiction outside of their own upon judicial proceedings in which they are concerned, and which require their presence, without incurring the liability of being picked up and held to answer to some other adverse judicial proceeding against them, is so far a matter of public policy that it has received almost universal recognition wherever the common law is known and administered." Rapalje, J., says that this immunity does not depend upon any statutory provisions, but is deemed necessary for the due administration of justice, and that it is not confined to witnesses but extends to parties as well.² In an earlier New York case it is said that without this rule extending immunity to witnesses and suitors courts would often be embarrassed. "Witnesses might be deterred, and parties prevented from attending, and delays might ensue or injustice be done."³

The rule of protection is absolute,⁴ *cumdo, morando et*

¹ Halsey v. Stewart, 4 N. J. L. 366.

² Andrews v. Lembeck, 46 Ohio St. 38, 18 N. E. 463.

³ Matthews v. Tufts, 87 N. Y. 568, citing Cole v. Hawkins, Andr. 275; s. c., 2 Str. 1094; Arding v. Flower, 8 T. R. 534; Miles v. McCullough, 1 Binn. 77; Hayes v. Shields, 2 Yeates, 222; Parker v. Hotchkiss, 1 Wall. Jr. 269, Fed. Cas. 10,739; Juneau Bank v. McSpedan, 5 Biss. 64, Fed. Cas. 7,582; Halsey v. Stewart, 1 South. (N. J.) 366; Miller v. Dungan, 8 Vroom, 169; In re Healey, 53 Vt. 694; s. c., 38 Am. R. 712.

⁴ Person v. Grier, 66 N. Y. 124; s. c., 26 Am. R. 35; Norris v. Beach, 9 Johns. 294; Hopkins v. Coburn, 1 Wend. 292.

For additional authorities see XIV, Albany Ed. N. Y. Reports note; Id., Book XVIII, p. 369 and 32 Am. & Eng. Encyc. of Law 163-167 and notes. For full discussion of rule followed in the courts, see Larned v. Griffin, 1 W. R. 590; Ex parte Hurst, 1 W. C. 186, Fed. Cas. 6,994; Juneau Bank v. McSpedan, 5 Biss. 64, Fed. Cas. 7,582; Blight v. Fisher, Pet. C. s. c., Fed. Cas. No. 1,542; Parker v. Hotchkiss, 1 Wall. Jr. 269; s. c., Fed. Cas. 10,739; United States v. Horn, 28 Fed. R. 299; Brooks v. Well, 4 Fed. R. 166; Miner v. Marshall, 28 Fed. R. 387; Ex parte Levi, ⁵ Sanford v. Chase, 3 Cow. 381.

undo,¹ while going, remaining and returning.² But the rule does not protect one who is a mere spectator in court.³

§ 334. In what contempt consists — Continued.— No avowal of respect for the court and its authority and assertion of absence of bad intent can relieve a party from the actual consequences of his deliberate act. An act of intentional disrespect for the authority of the court cannot be atoned for by any amount of professions of good faith or assertions of respect for the court. "It is thoroughly settled that such avowals of respect cannot weigh against the plain implications of the conduct itself."⁴ Such a course would be inconsistent with that "rule of law that every man must be presumed to intend the natural and necessary consequences of his own deliberate acts."⁵ One might as well try to escape punishment for a deliberate assault and battery by an avowal of respect for the person assaulted and assertion of a want of any criminal intent. Apologies to the court and disavowal of want of respect for its authority, if in good faith and not brought about by the exigencies of the situation, should, perhaps, be taken into consideration in mitigation of the punishment for the offense, but can never constitute an excuse or justification of an act amounting in itself to a contempt.⁶

§ 335. Master's duty and the remedy.— Any unwarranted interference with the master while he is engaged in the discharge of a duty under an order of court is a contempt of court and punishable as such, precisely as if the court were acting without the intervention of the master. Such act, however, to be punishable as a contempt must be done while the officer is acting under an order of the court. This does not mean a written order always, but only an exercise of authority, constituting a requirement. An order of reference

¹ *Person v. Grier*, 66 N. Y. 124, 23 Dec. 862, 370, Fed. Cas. 17,210; *People v. Freer*, 1 Caines' R. 485, 518.

² *Greer v. Young*, 120 Ill. 184, 189, 11 N. E. 167; *Gregg v. Samner*, 21 Ill. App. 110. ³ *People v. Wilson*, 64 Ill. 195, 219, 16 Am. R. 528.

⁴ *McIntire v. McIntire*, 5 Mackey (D. C.), 244. ⁵ *Rogers Mfg. Co. v. Rogers*, 38 Conn. 121; *Des Moines St. R. Co. v. Des Moines Broad Gauge St. R. Co.*, 74 Iowa, 585, 38 N. W. 496; *In re Woolley*, 11 Bush (Ky.), 95; *Murdock's Case*, 2 Bland (Md.), 461, 20 Am. Dec. 381; *State v. Collins*, 63 N. H. 694.

⁶ *United States v. Anonymous* (U. S. Cir. Ct. W. D. Tenn.), 21 Fed. R. 761, 772; *Wartman v. Wartman*, Tan.

in a cause to take proof carries with it the protection of the court while engaged in that duty.¹ The master should preserve order and decorum upon the hearing of a reference before him. The power to punish for contempt is inherent in every court and its jurisdiction extends to all the departments and officers of the court. The master has no power to punish an offender for contempt, but, in a proper case, it is his duty to certify the facts to the court, upon which certificate an attachment will at once be ordered. The remedy of a party who has been insulted or outraged in the master's office is to apply to the master for such certificate and present it to the court.²

The proper method of procedure in case of improper conduct in the master's office amounting to an obstruction, or in case of disobedience of any lawful order of the master, referee, commissioner or examiner, as the case may be, is to report the same fully to the court, when the court may of its own motion, "upon the presentation and filing of said report," direct the issuance of a rule upon the party charged "requiring him to appear before the court on a day named therein and to show cause in writing why he should not be punished for a contempt of court because of his alleged conduct."³ If the party charged fails to appear and answer said rule, an attachment issues and he is arrested by the marshal or sheriff and brought before the court to answer the charge.⁴ The charge in the case referred to in the foot-note was the interruption and violent breaking up of the examination of a witness by persistently dictating, prompting and claiming to control the answers of the witness; also by insulting the examiner by the use of violent and abusive language to him after he had left his office and was upon the street.⁵

¹ *Bridges v. Sheldon*, 18 Blatchf. 295, 7 Fed. R. 17, 42-46.

² *French v. French*, 1 Hogan, 188.

³ *United States v. Anonymous* (U. S. Cir. Ct. W. D. Tenn.), 21 Fed. R. 761.

⁴ *Id.* In the case referred to, the court, in the same order, directed the district attorney to "appear and prosecute on behalf of the United States." For form of affidavits in

support of the rule, and for form of answer of respondent, see *Id.*, pp. 764.

⁵ For another form — an information by the attorney-general in the name of the people, for a contempt of court committed outside the presence of the court, also the answer of respondent to same — see *The People v. Wilson*, 84 Ill. 1 Am. R. 528.

If the party denies the contempt, the court, either for itself or by reference to a master, ascertains the facts upon the proof, either party examining witnesses by affidavit or otherwise.¹ In some states attempts have been made by statute or by rule of court to confer upon the master or referee the power to punish parties for contempt. Thus, in Alabama, the register in chancery, when holding a reference by order of the chancery court, may punish for contempt by fine not exceeding ten dollars, and by imprisonment not exceeding two days.² So, too, under the Indiana code, the master commissioners are authorized to issue subpoenas for witnesses, with power to compel attendance and also the same power to punish for contempt as is given to justices of the peace;³ but, as the supreme court of the latter state held a provision of the code attempting to confer power upon the master to issue writs of *habeas corpus* and to pass upon all motions and make all orders concerning the same, to be unconstitutional, it being an attempt to confer judicial power upon a ministerial officer, it is probable that the same rule would be applied to the provision relating to power to punish for contempt.

XVIII. HEARING ON RE-REFERENCE.

§ 336. Re-reference — The master's duty. — What are the duties of a master in a case of re-reference to him depends upon five things:

First. The nature of the case itself as originally referred to him.

Second. What was required of the master under the original order.

Third. What the master has already done under the original order.

Fourth. What exceptions were sustained, if any, to his previous findings and what overruled.

Fifth. The directions given by the court, or chancellor, as contained in the order of re-reference.

¹United States v. Anonymous, 21 of procedure, see this interesting Fed. R. 761, 767. For full discus- case.

sion of distinction between civil ² Code, sec. 668.

and criminal contempts and methods ³ Code, sec. 1465.

If the nature of a case itself was such as to require the taking of evidence and the finding of facts, and the order of reference is general, with no limitation as to the taking of further evidence, then the master may properly receive additional testimony, if offered by the parties.

If it is intended that the master should take no further evidence the court should say so. "The general rule is that upon a re-reference to the master to review his report, he is entitled to receive further evidence. In *Twynford v. Traill*,¹ Lord Tenham said: 'I have always been of the opinion that a master is entitled to receive further evidence. It seems to be nonsense to refer it back to the master, unless he is at liberty to receive further evidence; because the conclusion afforded by the evidence already taken might have been drawn by the court without the assistance of the master.' The case of *Livesey v. Livesey*² is to the same effect. I apprehend, therefore, that where the court does not mean that the master should receive further evidence, the order must contain a direction to that effect, unless the reference back is expressed to be for a purpose on which further evidence could not be material."³ If it is intended upon a reference that the master shall receive further evidence the order of re-reference should so provide. A master upon a re-reference generally may receive further testimony upon any contested question of fact, but where the re-reference is to ascertain a particular fact, the master has no power to open up other matters in his report not objected to in his first report.⁴ In Georgia it is provided by the Code, section 4593, that, upon the hearing of a re-reference before the master, "the evidence shall be confined to such issues as the judge, in the order of recommitment, may indicate, or may be ordered to be taken *de novo*, the parties may agree as to what portions of the original report shall be retained in lieu of introduction."

§ 337. Re-reference — The master's duty — Continued. An order of re-reference is frequently made because a master fails to discharge the duty enjoined upon him by the original

¹ 3 M. & C. 642.

² 10 Sim. 381.

³ *Morley v. Mathews*, 12 Grant's Ch. 453.

⁴ *Morley v. Mathews*, 12 Gr. Ch. 453.

⁵ *Williams v. Haun*, 10 Gr. Ch.

order. For example, he may have wholly failed to take testimony and report upon one of the matters or issues submitted to him, and the re-reference may have been necessary to enable him to complete his labors. He, in such a case, must carefully examine the directions given in the original order and also his previous findings to see how far he failed in the discharge of his duty, or the nature of the re-reference may indicate a dissatisfaction of the court with some particular finding of fact, and that such re-reference is made to correct it alone, in which event the master should confine his review accordingly. Again, the exceptions sustained and those overruled may indicate clearly where the defect is, and what he is expected to correct. For example, exceptions to each and every finding of fact except one may have been overruled, indicating the court's satisfaction with his report except as to a single finding, to which the exception has been sustained. In such a case the master would not be justified in receiving any further evidence upon a re-reference except as to such single question. Exceptions passed upon by the court, and the orders of the court thereon, may show clearly the conclusions of the court, and it would not be proper for the master to attempt to re-open the case as to such questions.

§ 328. Re-reference — The master's duty — Continued.— The course to be pursued by the master upon a re-reference depends upon the terms of the order. Thus, where a specific exception is taken to the finding, and another specifying what the master should have found, and both exceptions are allowed by the court, and the matter re-referred for the consideration of the master, his findings must not be inconsistent with the action of the court. In an English case of this character Lord Cottenham, chancellor, said:

"The master, upon a reference to take a certain account — it is immaterial what account — comes to a certain conclusion and finds a certain sum due. One of the parties files two exceptions to the master's findings; one, that the master ought not to have so found and certified as he has found and certified; and the other, that he ought either to have found that nothing was due, or that a sum amounting to 4550*l.* 9*s.* 1*d.*, and no more, is due. The result is, that both these exceptions are allowed. Now that, I consider, to be identically the same

f the court had made an order declaring that the master found a sum due which was not the correct sum, and should have found either that nothing at all was due, or that a sum not exceeding 4550*l.* 9*s.* 1*d.* was due. On that question it is referred back to the master, to review his report. What was the master to do? One or the other of these things ought to have taken place, viz.: either that nothing was due, or that a sum not exceeding 4550*l.* 9*s.* 1*d.* was due. The court had adjudicated upon the case so far as to decide whether anything was to be determined by the master, but whether 0*l.* 9*s.* 1*d.* or nothing was due. That appears to be the necessary construction of the vice-chancellor's order; and the same as if the order had incorporated the exceptions, and directed that the master should find either nothing due, or a sum not exceeding 4550*l.* 9*s.* 1*d.* to be due. If that had been the terms of the order, there could have been no doubt whatever as to the extent of the master's inquiry. I understand, I think the master is precluded from entering into any other inquiry than this, viz.: whether anything, or whether a sum not exceeding 4550*l.* 9*s.* 1*d.* is due."¹

339. Re-reference — The master's duty — Continued. Where an exception to a master's report not only states that the master ought not to have reported as he has done, but also states what he ought to have found, the court, if it allows the exception and refers it back to the master to review his report, does not adopt the conclusion which the exception suggests, but intends that the master ought to have come to; but intends that the whole subject of the reference shall be reconsidered by the master, either upon the old evidence alone or upon that and any other evidence which the parties may think proper to bring before him.² But in no event, upon a re-reference, should the master re-open the whole case where it was clearly the intention of the court to limit his review to a single branch of the subject; and in no event should he allow the parties to submit claims wholly inconsistent with their previous contentions. Thus, upon a re-reference to a master he has no power to entertain a claim, not previously made before him, unless the court orders him specifically so to do.³

¹ *Twyford v. Traill*, 3 M. & C. 645, 2 Livesey v. Livesey, 10 Sim. 8.

² *Romanes v. Herne*, 22 Gr. C.

The foregoing suggestions are made with reference to a case where the order of re-reference does not clearly and specifically set out what is required of the master. There is no reason why an order of re-reference should not clearly and definitely set out the duties required of the master, but, unfortunately, it frequently happens that such orders are so loosely drawn as to render it difficult for the master to determine what duties are required of him. If, upon inspection of the order and of the exceptions, as passed upon by the court, he is unable to determine what is required of him, he should at once apply to the court for more explicit directions. His duties here are the same as upon an original order of reference.¹ Upon an appeal from the master's findings and a re-reference of the cause, it is the duty of the master to follow strictly the directions of the chancellor as set out in the order;² and if he fails to observe the terms of such order it is the duty of the court to set aside his acts and doings and send the cause back to him with further directions.

¹ *Ans*, ch. III, div. "Order of Reference," § 153.

² *Gilbert v. Jarvis*, 20 Grant's Ch. R. 478.

CHAPTER VI

THE MASTER'S REPORT.

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I. MASTER'S FINDINGS.

§ 340. Master's findings — General principles.— The great weight to be attached to his findings should cause the master to use every effort in his power to arrive at just conclusions as to the facts. His errors in the application of the law will be corrected by the chancellor with a free hand, but from his erroneous conclusions as to the facts, where the evidence is conflicting, there is practically no appeal. As it is well said by the court of chancery of Ontario: "The great weight necessarily attached by the court to the finding of the masters upon facts in which they have had the advantage of being themselves present and hearing the evidence of witnesses should make them anxiously careful to come to a right conclusion. The court *must* place great faith in their carefulness and judgment; and if they fail in these, the consequence must be, in many cases, a miscarriage of justice."¹

After the termination of the argument in a contested cause the master begins what frequently proves to be a laborious task — that of forming his conclusions of law and of fact which must precede the making of his report. It is thought a few suggestions upon this subject may be of assistance to the conscientious master in the discharge of this duty. Chancellor Kent's method of preparation for the decision of a cause is an admirable one and commends itself to every one having such a duty to perform. He says that it was his practice to first make himself perfectly and accurately master of the facts;

¹ Day v. Brown, 18 Grant's Ch. R. 681, 682.

that he did this by abridging the bill, the answers and the depositions, and that, by the time this slow and tedious process was done, he was master of the cause and ready to decide it. He adds that he then saw where justice lay and that the moral sense decided the cause half the time. He then searched the authorities until he exhausted his books, once and awhile finding some technical rule that embarrassed him, but generally finding *principles* suited to his view of the case.¹ Sir Charles Russell, somewhat more in detail, in his method of study adopted practically the same course. His first rule was to do but one thing at a time, whether it was reading a brief or eating oysters, concentrating his whole faculties upon the work before him. Secondly, when dealing with complicated facts, to arrange the narration of events in the order of date — a simple rule not always acted upon, but which enables you to unravel the most complicated story, and to see the relation of one set of facts to another set of facts. Thirdly, never to trouble about authorities or case law supposed to bear on the particular question until you have accurately and definitely ascertained the precise facts. This last rule he says he learned from Lord Westbury; that when quite a young man he was, in arguing a cause before that eminent judge, plunging into a citation of authorities, when the judge very good-naturedly pulled him up, saying: "Mr. Russell, don't trouble yourself with the authorities until we have ascertained with precision the facts, and then we shall probably find that a number of the authorities which seem to bear some relation to the case have really nothing important to do with it."²

II. FINDINGS OF FACT.

§ 341. Findings of fact — What facts are in issue.— The master's conclusions of law are necessarily based upon his findings of fact. The facts found must sustain the findings upon the law, and the law of the case must be predicated upon the findings of fact. If the findings of law are unwarranted by the facts found, it is equally erroneous as would be the

¹Green Bag, vol. 9, p. 210.

²39 Alb. Law Jour. 304; 1 Elliott's Gen. Prac., p. 2, note.

same error committed by a judge in his charge to the jury. It therefore follows that the master's findings of fact necessarily precede his findings or conclusions of law; and the first thing to be done is to determine what are the facts to be proven, in other words, what facts are in issue? What are the issues made by the pleadings is a question solely of law. In a trial at law it is the duty of the court to state the issues to the jury.¹ The same rule applies in a chancery case. Whether a point is in issue or not must be determined from the pleadings, and must be determined by the master by inspection of the same.² If he errs in this regard by sending up to the court findings upon points or matters not put in issue by the pleadings, such findings will not vitiate his report if correct upon matters that are in issue; but such erroneous findings should be rejected as surplusage; but, if the court can see that the findings, upon matters that *are* in issue, are based upon and influenced by erroneous conclusions either of fact or law, upon matters not involved in controversy, the whole report should be set aside, and, on motion, re-referred to the master with proper directions.

The master should waste no time in making immaterial findings, because if made they can be of no possible benefit to either party. An immaterial finding will be rejected as surplusage by the chancellor, and as a matter of course, a demurrer based on it must go with it. The rule on this subject is that the master's findings of fact should only be such as are necessary to sustain his conclusions of law. He is not required to find other facts which have no bearing upon the issues involved or are merely of a negative character.⁴ It is not part of the master's duty to investigate and report his conclusions upon collateral matters not embraced within the order of reference.⁵ It is not necessary that all the allegations of a bill should be proved precisely as charged, but all the law

¹ *Buckingham v. Payne*, 86 Barb. 81, 87.

² *Thompson on Trials*, sec. 1027; 11 *Encyc. of Pl. & Pr.*, p. 154; *L. C. R. R. Co. v. King*, 179 Ill. 91, 93, 94.

³ *Crone v. Crone*, 180 Ill. 599, 605, 54 N. E. 605; *Westlake v. Horton*, 85

Ill. 228, 8 N. E. 232; *Johnson v. Johnson*, 114 Ill. 611, 55 Am. R. 883.

⁴ *McAndrew v. Whitlock*, 2 S. (N. Y.), 633, 632; *Nelson v. Ing*, 27 How. Pr. 1; *Buckingham v. L*, 36 Barb. 81, 87.

⁵ *Fordyce v. Shriver*, 115 Ill. 540, 5 N. E. 87.

quires is that enough of the material allegations shall be substantially proved to sustain the decree.¹ All mere conclusions of the pleader should be disregarded by the master in determining the relief to be recommended to the court. It often happens that in framing a bill in chancery the pleader, after having correctly stated the actual facts of the case, which is all the law requires, proceeds to make some additional allegations with respect to what the pleader supposes to be the legal effect of those facts, which may be entirely erroneous, yet the complainant is not to be concluded or prejudiced by such unnecessary statements. His rights must depend upon the actual facts stated, and not upon the erroneous conclusions of the pleader as to their legal effect. Where the actual facts are correctly stated in the bill it is the duty of the master to recommend and of the court to render such decree and grant such relief as the law requires from the actual facts stated and proven on the hearing, without regard to what the pleader may have contemplated in framing the bill.² In determining what the real issues are submitted to him by the order of the court and the pleadings, it is the duty of the master to consider the facts alleged and not the deductions or conclusions of the pleader, which may or may not be correct. It is not proper for a party, either in the bill or answer, to state the conclusions of law which he intends to deduce, or has deduced, from the facts he has set out — that would be, and is contrary to all the principles of good pleading, but he should merely state the facts intended to be proved, and leave the inferences of law to be drawn by the court or the master.³

§ 342. **Burden of proof.**— In determining a contested issue of fact the next step after clearly ascertaining what the precise issues are, is to find the correct answer to the question: Where is the *onus probandi*, and what measure of proof is required?⁴ In other words, after ascertaining the precise fact or facts which must be established, upon whom rests the burden of proving such fact or facts, and what is the *quantum* or measure

¹ Allen v. Woodruff, 96 Ill. 11, 18.

² Id.

³ Stone v. Moore, 26 Ill. 165, 172; 2
Daniell's Ch. Pr. 815, 816. See this
subject fully discussed, *ante*, ch. V,

div. 2, "Examination of Decree and
Pleadings—The Issues," §§ 174-176.

⁴ Riggs v. Powell, 143 Ill. 453, 458,
32 N. E. 482.

of proof required by law to justify the master in saying that the party upon whom the burden rests has established such fact or facts, so that he is entitled to the relief desired? As said by the learned author of the article entitled "Burden of Proof," in 5 Am. & Eng. Ency. of Law (2d ed.), the term "burden of proof" has two distinct meanings: by the one is meant the duty of establishing the truth of a given proposition or issue by such a *quantum* of evidence as the law demands in the case in which the issue arises; by the other is meant the duty of producing evidence at the beginning or at any subsequent stage of the trial, in order to make or meet a *prima facie* case. (See notes and cases there cited.) Generally speaking, the burden of proof, in the sense of the duty of producing evidence, passes from party to party as the case progresses, while the burden of proof, meaning the obligation to establish the truth of the claim by a preponderance of evidence, rests throughout upon the party asserting the affirmative of the issue, and unless he meets this obligation upon the whole case he fails. This burden of proof never shifts during the course of a trial, but remains with him to the end.¹

The same rule obtains in chancery as in trials at law, the burden of proof resting generally on the party who alleges the existence of a fact or facts. Thus, where the answer admits the material allegations of the bill and sets up new affirmative matters by way of defense or justification, the burden of proof rests upon the defendant, and failing to establish the truth of such matters by sufficient and competent evidence plaintiff is entitled to a decree.² We say that the rule is generally as stated, but to this rule there are many exceptions. The following illustrations are given, the one a charge of fraud where parties are "dealing at arm's length," and the other the same charge where a relation of trust and confidence existed. Where parties dealing with each other are upon equal footing, or, as said in the law books, are "dealing at arm's length," the rule of *caveat emptor* applies. Each is expected to be on his

¹ Egbers v. Egbers, 177 Ill. 82, 88, 62, 87, 88; Reid v. McCallister, 49 53 N. E. 285. Fed. 16; Gresley, Eq. Ev. (2d Am. ed.)

² Lake Shore & M. S. Ry. Co. v. 16, 468; McCoy v. Rhodes, 11 How. Felton, 48 C. C. A. 189, 193, 103 Fed. (U. S.) 131. 227; Hart v. Ten Eyck, 2 Johns. Ch.

guard and to make due allowance for the exaggerated statements of the other made in attempting to drive a bargain. In such cases much that is said is classed as "dealer's talk,"¹ or comes under the head of what Judge Breese called "gassing."² The law presumes that every man of sound mind and upon equal footing with his antagonist has full knowledge of such "tricks of the trade," and if he fails or refuses to exercise reasonable caution and prudence, the law refuses to furnish him a remedy, it being the result of his own folly if he chooses to give credence to such matters.³

It is said that, under such circumstances, the credulity of one's antagonist is the only limit.⁴ A party may even lie outright as to the price paid for an article he is trying to sell, and, however reprehensible this may be in morals or to a man with a high sense of honor, furnishes no redress to a party who, instead of depending upon his own judgment, relies upon the same.⁵ Each has a right to "exalt the value of his own property to the highest point his antagonist's credulity may bear, and to depreciate that of the other party," and the truth is, such statements are never regarded by practical men, but by them are regarded as the mere idle wind, or mere vamping of one who is attempting to sell for the highest possible value, or of the other who seeks to drive a bargain by buying at less than the actual value.⁶ Hence it has become a maxim of the law that *simplex commendatio non obligat*. The strict moralist may condemn the policy of the law in this regard, but any other rule would place the indolent and negligent on an equal footing with the prudent and vigilant; in fact would, in effect, be offering a premium for negligence and careless indifference to one's own interests.⁷ The man who refuses to make any effort to protect

¹ Kimball v. Bangs, 144 Mass. 321, 324, 11 N. E. 113.

² Tuck v. Downing, 76 Ill. 71, 92.

³ Id., p. 92; Kimball v. Bangs, *supra*.

⁴ Miller v. Craig, 36 Ill. 109; Noetting v. Wright, 72 Ill. 390; Tuck v. Downing, 76 Ill. 71, 92, 93.

⁵ Tuck v. Downing, 76 Ill. 71, 92-93. For cases where a party made false statements as to price paid or as to market price or value, see Banta v.

Palmer, 47 Ill. 99; Cronk v. Cole, 10 Ind. 485, 489-491; Graffenstein v. Epstein, 23 Kan. 443, 445, 33 Am. R. 171; Kimball v. Bangs, 144 Mass. 321, 11 N. E. 113; Noetting v. Wright, 72 Ill. 390.

⁶ Tuck v. Downing, 76 Ill. 71, 92.

⁷ Kennedy v. Richardson, 70 Ind. 524; Graffenstein v. Epstein, 23 Kan. 444, 33 Am. R. 171.

himself in dealing with others has no right to appeal to a court of equity for aid if his antagonist gets the better of him; the maxim: *Vigilantibus et non dormientibus jura subveniunt*; the law aids the vigilant and not those who sleep over their rights. In all cases where parties are thus dealing with each other at arm's length the burden of proof is on the complaining party to sustain the allegations of his bill by proper proof.¹ It is even said in some cases that the complaining party must sustain the allegations of his bill "beyond a reasonable doubt;"² in other cases it is said that the court "must be satisfied with the clearest and most satisfactory evidence."³

§ 343. Burden of proof—Continued.—But in all cases where the relationship between the parties is one of trust or confidence a wholly different rule obtains. This relationship may be one that the law implies from the legal status of the parties. In case of parent and child, guardian and ward, attorney and client, trustee and beneficiary, partner and partner, principal and agent, and the like, the law presumes a confidence and trust to be reposed, to take advantage of which amounts to a fraud; and for that reason the courts will scrutinize with the most jealous vigilance all dealings between parties standing in such relation. Because of this confidence the law requires the party occupying the position of trust or confidence to observe frankness, candor and sincerity toward the other party, and a failure to do so is held to be a breach of that confidence and a fraud.⁴ The duty devolving upon such party is not only a negative one but is an active one as well. He must not only not be guilty of any fraudulent representations and must not refrain from the exercise of any improper influence upon the other party, but the law imposes upon him the duty of putting the *cestui que trust*, or other person confiding in him, in possession of all the facts surrounding the transaction of which he himself has knowledge.⁵ The same rule extends to a "spiritual adviser and medical attendant,"⁶ in fact to all

¹ Jones v. Degge, 84 Va. 685, 690, 5 S. E. 799.

² Young v. Edwards, 73 Pa. 257; 2 Rice on Ev., pp. 972, 973, 975, 953.

³ Painter v. Drum, 40 Pa. St. 467.

⁴ Casey v. Casey, 14 Ill. 112, 114.

⁵ Jones v. Lloyd, 117 Ill. 597, N. E. 119; Hunter v. Atkins, 3 K. 113, 135, 136; Cooke v. Lamotte, 15 Bea. 234, 240; Smith v. Kay, 750, 777.

⁶ Cooke v. Lamotte, 15 Bea.

sons standing in confidential relations with each other.¹ In a court of equity this principle is applied to every case where influence is acquired and abused, where confidence is reposed and betrayed. The relations in which the court is most ordinarily called upon to apply the rule are those of trustee and *cestui que trust*, and such like. It applies specially to those cases, for this reason and for this reason only, that from those relations the court presumes confidence put and influence exerted; whereas in all other cases where those relations do not exist, the confidence and influence must be proved extrinsically; but where they are proved extrinsically, the rules of reason and common sense, and the technical rules of a court of equity, are just as applicable in the one case as in the other.²

This rule applies also to cases where one party possesses superior advantages over the other. Thus a party seeking to charge an unlettered man, who can neither read nor write, upon a written instrument signed by making his mark, the burden of proof rests on such party to show, past doubt, that he fully understood the object and import of such instrument.³ Lord Eldon says: "It is asked, where is that rule to be found? I answer, in that great rule of the court, that he who bargains in matter of advantage with a person placing confidence in him is bound to show that a reasonable use has been made of that confidence; a rule applying to trustees, attorneys, or any one else." He also says: "It is necessary to say, broadly, that those who meddle with such transactions take upon themselves the whole proof that the thing is righteous," and this they "must show to a demonstration."⁴ The burden is on him to vindicate the transaction from any shadow of suspicion, to show that it was perfectly fair and reasonable in every respect, and courts will scrutinize the transaction with great severity.⁵ In all cases where a fiduciary relation exists between the parties, and in all cases where it is established by the evidence that one of the parties possessed a power or influence over the

240; *Billage v. Southee*, 9 Hare, 584;
1 Story's Eq. Jur., § 814.

¹ Story, *loc. cit.*, § 811.

² *Smith v. Kay*, 7 H. L. 750, 778;
Casey v. Casey, 14 Ill. 114, 115.

³ *Selden v. Myers*, 61 U. S. (20 How.)
503, 509.

⁴ *Gibson v. Jeyes*, 6 Ves. 266, 271,
278; *Cooke v. Lamotte*, 15 Beav. 284,
241, 242.

⁵ 1 Perry on Trusts, § 428 and cases
cited.

other, the burden of proof rests upon the party occupying a fiduciary relation, or possessing the power or influence, as the case may be, to establish, beyond all reasonable doubt, the perfect fairness and honesty of the transaction.¹ Where fraud is the matter under investigation and the parties do not stand upon equal footing, it is the duty of the master to make an exhaustive examination of the subject and seize upon every circumstance that will throw any light on the question. The following may stand as a good illustration of a case of this character: "Perhaps there is no more pitiable object than a very old man, broken by the weight of years, crushed by his loss and greatest sorrow, and standing alone in the world without a hand to help. Too enfeebled in mind and body to be watchful or to penetrate the probabilities of his situation and the designs of others, he is ready to cast himself into the arms of those who approach him with a view to benefit by the property he has. When such a man makes a bargain with an unsuitable or an insolvent man, and puts all into his hands to secure that assistance and support he so much needs, I would, as a chancellor, take hold of the slightest circumstance to rescind and avoid his deed. . . . In such a case it is the duty of the master to probe the matter well, and leave nothing without its effect which tends to undo a bargain so wanting in wisdom as this."² But where the parties stand on equal footing, have equal intelligence and knowledge of matters in controversy, the court will allow less latitude, and will require clear evidence to undo that which has been deliberately approved, such as opening up a stated account.³

In the last chapter the subject of accounting in the master's office is fully entered into, where it is shown that, under the English chancery order of 1828, generally adopted as a rule of practice in the chancery courts of this country, the accounting party is required to bring in his account in the form of debtor and creditor, which account, duly verified by affidavit, is presumed to be correct until its correctness is duly challenged by proper objections on the part of the complainant. It is then further shown⁴ that this account, when so brought in, together

¹ Kerr on Fraud and Mistake, p. 886.

² Pitt v. Cholmondeley, 2 Ves. 565.

³ Hetrick's Appeal, 58 Pa. St. 477.

⁴ Ante, § 297.

with the objections thereto, present to the trial court distinct issues, easily comprehended and determined, and that such objections, when specific and definite, are the pleadings to the items of account. It only remains in this connection to state the rule as to the burden of proof under such issues. This depends wholly upon the character of the objections. Such objections may question the correctness of either the debit or credit side of the account, or they may challenge the correctness of both. In case the complainant attacks the debit side of the account only, that is, if his objections are that the amounts with which the defendant charges himself are too small, or that he has improperly omitted items with which he should be charged, then the burden is upon the complainant to substantiate his objections by competent evidence; but, on the contrary, if his objections relate only to the credit side of the account, that is, if he, by his objections, simply insists that the defendant is not entitled to the items of credit claimed, or, if entitled to such credit, that the amounts claimed are too large, then the burden of proof is on the defendant to show, by competent evidence, the correctness of the credit side of the account so far as the same is challenged by objections. In case the objections assail both sides of the account, then the burden of proof is on the complainant to support his objections to the debit side, and the defendant to substantiate the correctness of the credits claimed, the evidence, of course, being limited by the character of the objections.¹ Care must be taken to distinguish between cases in which the bill calls upon the defendant to state the account in his answer, the defendant's oath not being waived, and cases in which the defendant is ordered by the court to state the account. In the latter case the above rule as to the burden of proof applies, while in the former it does not. The answer of the defendant, stating the account as required, is directly responsive to the bill. Having obtained precisely what he demanded, the complainant

¹ *Halsted v. Tyng*, 29 N. J. Eq. 86; *Brands*, 42 N. J. Eq. 708, 11 Atl. 828; *New York Bay Cemetery Ass'n v. Pratt v. Grimes*, 48 Ill. 376; *Clapp v. Buckmaster*, 49 N. J. Eq. 439, 33 Atl. Emery, 98 Ill. 523; 2 *Daniell's Ch. Pr.* 819; *Thatcher v. Hayes*, 54 Mich. 184, (1st ed.), 877, 879 *et seq.*; *Id.* (6th ed.), 19 N. W. 946; *Harding v. Handy*, 1221 *et seq.*; 2 *Smith's Ch. Pr.* (ed. 11 Wheat. 103, 127; *Silverthorn v.* 1834), 103 *et seq.*

has no right to complain of the fact that the law treats the defendant's account as established until the answer is disproved by two witnesses or the equivalent.¹ The rule, as stated above, applies only in a case where the court orders a general accounting;² as, in cases where the court treats the account as a "standing account," and therefore only gives leave to "surcharge and falsify," the presumption is in favor of the correctness of the whole account stated, and the burden rests upon the complainant to show "fraud, mistake or error."³ The *onus probandi* is always on the party making the surcharge or falsification, and, if he fails to prove it, the account must stand as correct. It is presumed to be correct, after having been once settled, until the contrary appears. Here lies the difference between this and a general accounting; for, in the latter, the party producing the account must show the items to be correct.⁴ It is too, as is shown in the first part of this section, the rule does not apply where the accounting party stands in a fiduciary capacity, or when the relationship between the parties is, for any other reason, one of trust and confidence. In such cases the burden rests upon the accounting party to prove the correctness of the whole account, both debits and credits.

Under the English chancery practice all items of credit where the amount was under 40s., the oath of the defendant as made in his affidavit, or answer, or examination, that he had paid them, was considered sufficient; but, although his oath was deemed sufficient to establish the fact of payment, it did not establish its propriety.⁵ But as to all items above that amount the defendant was required to make "full proof." The court sometimes, induced by the particular circumstances of the case, by special directions to the master, allowed a departure from this rule. Thus, on an inquiry into a very remote transaction, accounts kept by a deceased party at the time were allowed to be taken as *prima facie* evidence, throw-

¹ *De Mott v. Benson*, 4 Edw. Ch. 297; *Barkdale v. Hall*, 18 Rich. Eq. (S. C.) 180; *Powell v. Powell*, 7 Ala. 562; *May v. Barnard*, 20 Ala. 200, 212. As to weight to be given to a sworn answer, see *ante*, § 277.

² 2 Smith's Ch. Pr. (ed. 1884), 101.

³ *Id.* See also *ante*, § 300.

⁴ *Phillips v. Belden*, 2 Edw. Ch. 22, 23. See *ante*, § 300.

⁵ 2 Smith's Ch. Pr. (ed. 1884), 102; *Daniell*, Ch. Pr. (6th ed.) 1227, note 4. See also *Rensen v. Rensen*, 2 Johns. Ch. 495, 501.

the *onus* on the other side of impeaching them.¹ But where the items claimed as credits are susceptible of "complete proof," and there can be no difficulty in procuring it, the master does right in requiring it.²

§ 344. **Burden of proof — Continued.**— Generally it is easy to tell from an examination of the pleadings upon whom the burden of proof rests. Where the answer denies an allegation of the bill, it of course throws the burden of proof upon the complainant to prove such allegation, and where the answer admits the allegation and sets up some matter in defense, the burden is on the defendant to prove the truth of his allegation; but it is where the answer neither admits nor denies the allegations of the bill that the question is not so easy of solution. In some jurisdictions such silence on the part of a defendant admits the truth of the allegation of the bill, while in others the complainant is not relieved of his duty to prove the truth thereof, or in other words, the burden rests upon him to prove the truth of his allegations precisely as if they were denied by the defendant's answer. Sometimes the practice in this regard is regulated by a rule of court. The New Hampshire Chancery Rules provide that: "All facts well alleged in the bill, and not denied or explained in the answer, will be held to be admitted."³ A similar provision is found in the recent Michigan Rules as follows: "Every material allegation in the bill to which the defendant shall not make answer *shall be taken as admitted by the defendant.*"⁴ In New Jersey it is held that a material and controlling fact, not alluded to or denied in the answer, must be taken as confessed.⁵ In Illinois the rule is different. What is not expressly denied is considered as traversed and the complainant put upon proof thereof.⁶ The

¹ Smith's Ch. Pr. (ed. 1834), 102, citing *Chaloner v. Bradley*, 1 J. & W. 65. *Durfee v. McClurg*, 6 Mich. 238; *Morris v. Hoyt*, 11 Mich. 9.

² *Harding v. Handy*, 11 Wheat. 108, 127.

³ Rule 8, 38 N. H. 606.

⁴ Rule 10, § d, Stevens' Rules, p. 121. As to constructive admissions arising from a failure to answer matters within the defendant's knowledge, see *Weigert v. Franck*, 56 Mich. 200; *Victor Co. v. Jacobs*, 46 Mich. 494;

⁵ *Jones v. Knauss*, 81 N. J. Eq. 609; *Pinnell v. Boyd*, 33 N. J. Eq. 190; *Lee v. Stiger*, 80 N. J. Eq. 610; *Smith v. Ewing*, 23 Fed. 741; *Rogers v. Marshall*, 18 Fed. 59; *Mead v. Day*, 54 Miss. 58.

⁶ *De Wolf v. Long*, 2 Gilm. (Ill.) 679; *Morgan v. Herriock*, 21 Ill. 481; *Dooley v. Stipp*, 26 Ill. 86; *Glos v. Randolph*, 133 Ill. 197, 24 N. E. 426; *Litch v.*

supreme court of that state say: "It is not true, in proceedings in chancery, that what is not expressly denied is to be taken as admitted, the rule being that a matter which is neither admitted nor denied by the answer must be substantiated by proof.¹ Nor is the appellant correct in his supposition that the concluding clause of the answer constitutes an express admission of the allegations of the bill not denied by the answer, it being in fact a technical *traverse* of all matters in the bill not well and sufficiently answered unto, confessed and avoided, traversed or denied, and is in no sense an admission of those matters."² Under the New York practice, as it existed prior to the abolishment of the court of chancery, an allegation of complainant's bill, neither admitted nor denied by the answer, had to be sustained by proof.³ Where a respondent says in his answer that "with the knowledge possessed by him he can neither confess nor deny" an allegation of the bill, the complainant is put upon proof of same; but this rule does not apply where the "statements in the answer can, by fair interpretation, be construed into an admission of, or acquiescence in, the allegation of material facts."⁴

§ 345. **Measure or quantum of proof.**— This question of the measure or *quantum* of proof necessary to be produced by the party upon whom the *onus probandi* rests, to justify the court in granting the remedy demanded by the pleadings, is of more importance than it would seem at first blush. We are apt to think of cases being divided in this regard into but two classes: 1st. Criminal cases, where the proof must be *beyond a reasonable doubt*. 2d. Civil cases, where the *preponderance* of the evidence is sufficient. The truth, however, is that the sec-

Clinch, 136 Ill. 410, 26 N. E. 579; Cushman v. Bonfield, 139 Ill. 219, 247, 28 N. E. 937; Wilson v. Kinney, 14 Ill. 27; Stacey v. Randall, 17 Ill. 467; Trenchard v. Warner, 18 Ill. 142; Kitchell v. Burgwin, 21 Ill. 40; Heacock v. Durand, 42 Ill. 230; Cotes v. Rohrbeck, 139 Ill. 532, 28 N. E. 1110; Fridley v. Bowen, 5 Ill. App. 191; Beidler v. Douglas, 35 Ill. App. 124; Wilson v. Augur, 176 Ill. 561, 565, 53 N. E. 289.

¹ De Wolf v. Long, 2 Gilm. 679; Trenchard v. Warner, 18 Ill. 142.

² Litch v. Clinch, 136 Ill. 410, 421, 26 N. E. 579, citing Anderson's Law Dic., title *Traverse*; Gould's Pleadings, 350; Mitford's Equity Pleadings, 406.

³ Brookway v. Copp, 2 Paige, 539.

⁴ Byers v. Surget, 19 How. (60 U. S.) 303, 23 Fed. Cas. 426.

cases must again be divided into several groups, in which the *quantum* of proof required ranges all the way from cases in which *vague and uncertain proof* is held to be sufficient, to cases in which the party must make out his case *beyond a reasonable doubt*.

Cases in which the master or court may be called upon to determine the *quantum* of proof required may be classified as follows:

1st. Cases in which vague proof, or such as renders the existence of a fact probable.

2nd. Cases in which a preponderance of proof is sufficient.

3rd. Cases in which the proof must be clear and satisfactory.

4th. Cases where the law requires the party upon whom the burden of proof rests to prove his allegations beyond a reasonable doubt.

The illustrations are given as follows: Where the burden is on a party to establish a negative, a less degree of proof is sufficient than is required to prove an affirmative. "Full and conclusive proof, however, where a party has the burden of proving a negative, is not required; but even vague proof, which renders the existence of the negative probable, is, in such cases, sufficient to change the burden to the other party."

So, too, where, from the very nature of the case, the burden of the truth of the matter alleged rests peculiarly upon the opposite party. In such cases very slight proof will be sufficient to establish a *prima facie* case and throw the burden upon the opposite party to show what the actual facts are.

Cases in which the party is held to prove his case by a preponderance of the evidence it may be said that they conform to the general rule, and that those in which a less degree of proof is held to be sufficient and those in which a greater degree is required form the exception. The rule is so well understood that it is useless to give any illustrations.¹

¹ *Edstow v. Virginia*, 76 Ill. 84, 553; *Stillson v. Harger*, 1 Ill. App. 584; *Knisely v. Sampson*, 100 Ill. 573; *Leggett v. Ill. Cent. R. R. Co.*, 72 Ill. App. 577; *Hutchinson Nat. Bank v. Crow*, 56 Ill. App. 558, 567.

§ 346. **Measure or quantum of proof** — Contin
There are many cases in which it is held that it is insu
for the party upon whom the burden of proof rests to
his case by a bare preponderance of the evidence. T
lowing are given as illustrations: Where a bill is filed f
rescission of a contract on the ground of fraud the proo
be clear and satisfactory.¹ So, too, the specific perfor
of a contract will not be decreed "unless the cont
established by competent evidence, free from doubt
picion."² Where a party seeks the aid of a court of eq
reform a written instrument against a surety on the gro
mistake, the evidence must be so clear as to leave no d
and again, where the result of the judgment of the cou
be to inflict a penalty or establish a forfeiture, greater p
required. Thus, statutes against usury are highly pe
their nature, hence to establish a charge of usury the ev
must be clear and satisfactory;⁴ or where a party is ch
with being guilty of an act involving moral turpitude.
case where the defendant was charged with erasing the
of a grantee in a deed and inserting his own, it was hel
he was bound to establish affirmatively by the evidence
allegation "by clear and convincing proof," before
should be granted.⁵ In other cases great certainty is re
because of the importance of the matter under investig
thus, where it is sought to show, by parol proof, the co
of a lost will, it cannot be done "unless by the cleare
most stringent evidence."⁶

¹ *Tuck v. Downing*, 76 Ill. 71; *Mix v. White*, 86 Ill. 484; *Shinn v. Shinn*, 91 Ill. 477; *Walker v. Hough*, 59 Ill. 875; *Young v. Young*, 113 Ill. 480; *Greer v. Caldwell*, 14 Ga. 207, 56 Am. Dec. 553; *Farnsworth v. Duffner*, 142 U. S. 43; L. Ed., Book 35, p. 933, 12 Sup. Ct. R. 164; *Harrison v. Polar Star Lodge*, 116 Ill. 287, 5 N. E. 542.

² *Wolfe v. Bradberry*, 140 Ill. 578, 182, 183, 80 N. E. 665; *Allen v. Webb*, 64 Ill. 342; *Gosse v. Jones*, 73 Ill. 508; *Padfield v. Padfield*, 92 Ill. 198; *Wallace v. Rappleye*, 103 Ill. 229; *Phoenix Ins. Co. v. Rink*, 110 Ill. 588; *Woods v. Evans*, 113 Ill. 186; *Clark v. Clark*,

122 Ill. 383, 13 N. E. 553; *Schoonover*, 180 Ill. 448, 23 N. E. 381.

³ *Henkleman v. Peterson*, App. 601, 606.

⁴ *Mosier v. Norton*, 83 Ill. 51; *holz v. Wolf*, 103 Ill. 362; *Goo Bishop*, 145 Ill. 421, 34 N. E. 4; *ley v. Chicago Trust & Saving*, 165 Ill. 295, 46 N. E. 373; *Bis Blair*, 90 Ill. App. 64, 73, 75.

⁵ *Oliver v. Oliver*, 110 Ill.

⁶ *Davis v. Sigourney*, 8 Met 487, 488; *Shelburne v. Inob Bro. Ch. C. 338*; *Fudge v. P Va. 303*, 10 S. E. 7.

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sometimes the degree of proof by law; thus, in a criminal case, perjury, the falsity of the evidence is established by two witnesses; so, a witness under oath, the oath is solemn and unequivocal in its declaration, "unless these denials are proved to the contrary," they carry more weight than the testimony of a single witness with corroborating evidence. A party will not be entitled to a new trial on matters of belief and opinion. Particularly stated, are entitled to answer on the bill and answer.² The examination of the pleadings the court, and having ascertained the facts, rests and the measure or *quantum* of damages comes to what is frequently the case, for, no matter how careful the evidence, when it is voluminous, it is impossible, in a few sittings, with weeks or months, to know what it really is. It is through from beginning to end, in a majority of cases, a careful examination of the pleadings for the respective parties, the work may be thereby very much aided. A conscientious master will at least examine the statements. The master should have responsibility resting upon him, and at which the chancellor needs to be careful, for two reasons:

First. The matter was referred to the court, and, as every lawyer knows, the court never can receive again the matter in every detail that

¹ *Northern Development Co. v. H. H. H. H.*, 125 U. S. 247, 8 Sup. Ct. R. 881; 65
² *Story v. Hopp*, 104 U. S. 441; *Story*,
Ch. Pr., § 1528; *Daniell*, Ch. Pr. 841;

Second. He saw and heard the witnesses upon the stand, and had a better opportunity to weigh the evidence and arrive at correct conclusions, and the chancellor may, for this reason alone, approve an erroneous finding, when, if the evidence had been taken in open court, it would have been followed by a different result.

To determine what facts are established by the evidence requires not only a consideration of documentary evidence introduced, but the weighing of the testimony of the witnesses as well. Hence the importance of determining upon whom the burden of proof rests and the *quantum* of evidence required.

§ 347. **Measure or quantum of proof — Continuance.** Where a party has not used diligence in the presentation of his claim to a court of equity for redress he will be required to produce more full and satisfactory proof, and the greater the length of time which has elapsed between the date of the transaction and the time of complaint, the stronger the presumption must be in order to overcome the presumption of its falsity. The court will consider that many circumstances relied upon as evidence of fraud would be susceptible of satisfactory explanation if complaint had been made sooner.¹ In a case of this kind Judge Story said: Under such circumstances it is the plain duty of the court to require the most full and satisfactory proofs. It is not sufficient to raise suspicions of bad faith; plaintiffs must go further; they must establish the truth of the charge beyond a reasonable doubt, and by evidence not only competent, but credible.² A party who delays his claim for redress until many of the witnesses are dead, and the memory of the living dimmed by lapse of time, until all the details of the circumstances that go to make up and give color to a transaction are gone beyond recall, has no ground of complaint against a rule requiring strong and convincing proofs of the truth of his charges. Quoting again from Judge Story, we add: Lapse of time necessarily obscures all human evidence; and as it removes from the parties all the immediate means to the knowledge of the nature of the original transactions, it operates by a strong presumption, in favor of innocence, and against imputa-

¹ Walker v. Carrington, 74 Ill. 446, 458, 478.

² Gould v. Gould, 8 Story, Fed. Cas. 5,687.

fraud. It would be unreasonable, after a great length of time, to require exact proof of all the minute circumstances of any transaction, or to expect a satisfactory explanation of every difficulty, real or apparent, with which it may be incumbered. The most that can be fairly expected in such cases, if the parties are living, from the frailty of memory and human infirmity, is, that the material facts can be given with certainty to common intent; and, if the parties are dead, and the cases rest in confidence and in parol agreements, the most that we can hope is to arrive at probable conjectures, and to substitute general propositions of law for exact knowledge. Fraud, or breach of trust, ought not lightly to be imputed to the living; for the legal presumption is the other way; and as to the dead, who are not here to answer for themselves, it would be the height of injustice and cruelty to disturb their ashes, and violate the sanctity of the grave, unless the evidence of fraud be clear, beyond a reasonable doubt.¹ This enables us to understand what the same eminent judge means when he says that such a proceeding makes "men sin in their graves."²

§ 348. Measure or quantum of proof—Continued.—A fruitful as well as important source of equity jurisdiction is the reformation of written instruments where, by fraud, accident or mistake, they fail to express the true intent of the parties. This jurisdiction is unquestioned. Judge Breese says: "The power to correct a mistake in a writing is as much within the scope of this jurisdiction as any other mistake; the whole realm of mistake is laid open to the court, and its powers are limitless to correct, on a proper case made. That it should be dormant, when invoked to correct a mistake in a written contract, would be strange indeed."³ And it is equally well established that parol proof is admissible to show mistake in a written instrument.⁴ In Pennsylvania parol proof is ad-

¹ *Prevost v. Gratz*, 6 Wheat. 481, Va. 803, 307, 10 S. E. 7; 1 Story's Eq. Juris., §§ 154, 155.
² See also *Walker v. Carrington*, 74 Ill. 446, 453.

³ *Gould v. Gould*, 8 Story C. C. 516, Hunt v. Rousmanier, 8 Wheat. (U. S.) 540, Fed. Cas. 5,637.

⁴ *Hunter v. Bilyeu*, 30 Ill. 228, 247. See to same effect, *Smith v. Jordan*, 13 Minn. 264, 270 *et seq.*; *Trapp v. Moore*, 21 Ala. 693, 697; *Fudge v. Payne*, 86 Va. 803, 307, 10 S. E. 7; 1 Story's Eq. Juris., §§ 154, 155.
⁵ *Ivinson v. Hutton*, 98 U. S. 79, 82; *Hunt v. Rousmanier*, 8 Wheat. (U. S.) 174; 1 Story, Eq. Juris., § 156; 2 Taylor on Ev. (8th ed.) 1041; *Snell v. Insurance Co.*, 98 U. S. 85, 89, and many cases cited; *Gillespie v. Moon*, 2 Johns. Ch. 585, 595, 7 Am. Dec. 559;

missible to vary or contradict a written instrument, classes of cases: 1st. Where there was fraud, accident or mistake in the creation of the instrument itself. 2d. Where there is an attempt to make a fraudulent use of it, in violation of an agreement made at the time the instrument was signed, without which it would not have been executed.¹ Judge Story says: "In cases of asserted mistake in written instrument it is not denied that a court of equity has authority to reform the instrument. But such a court is very slow in exerting its authority; and it requires the strongest and clearest evidence to establish the mistake. It is not sufficient that there be some reason to presume a mistake. The evidence must be clear, unequivocal and decisive; not evidence which is equal or nearly *in equilibrio*."²

Various definitions of the *quantum* of proof required to justify a court of equity in the reformation of a written instrument, on the ground of fraud, accident or mistake, have been given by the courts. From a vast number examined the following illustrations are selected, an examination of which will show that, while they differ as to the degree of proof required, yet they all agree that a mere preponderance of the evidence is insufficient. Chancellor Kent says: "The cases which establish this head of equity jurisdiction require the mistake to be made out in the most clear and decided manner, and to the entire satisfaction of the court."³ "Mistake must be clearly proved."⁴ Mistake must be "clearly made out by proof entirely satisfactory."⁵ "Evidence should be clear, free from suspicion, and entirely satisfactory."⁶ "Requires very p

Townshend v. Stangroom, 6 Ves. 328; *Hunter v. Bilyeu*, 30 Ill. 228, 239 *et seq.*, an important case on account of the authorities collected and examined; *Fudge v. Payne*, 86 Va. 303, 306, 10 S. E. 7; 1 Story's Eq. Juris., §§ 154, 155, 156; *Gelpcke, Winslow & Co. v. Blake*, 15 Iowa, 387, 38 Am. Dec. 418.

¹ *Phillips v. Meily*, 106 Pa. St. 536, 543; *Juniata Building Ass'n v. Hetzel*, 103 Pa. St. 507, 511; *Renshaw v. Gans*, 7 Barr, 117, 118; *Rearich v. Swinehart*, 1 Jones (Pa.), 233, 238, 51

Am. Dec. 540; *Lippincott v. Man*, 83 Pa. St. 244, 246.

² *Wall v. Arrington*, 13 Gr. United States v. Munroe, 5 572, 577, Fed. Cas. 15,835.

³ *Lyman v. United Ins. Johna. Ch.* 630, 632.

⁴ *Burgin v. Giberson*, 26 72, 77.

⁵ *Bradford v. Union Bank* 57, 66.

⁶ *Shay v. Pettes*, 35 Ill. 360 v. Robertson, 37 Ill. 45, 64.

evidence to establish mistake."¹ Proof must not be "loose and unsatisfactory."² Evidence "must be clear and satisfactory, leaving but little, if any, doubt of the mistake."³ Must be "clear and satisfactory proof" of mistake.⁴ Must show mistake "beyond reasonable controversy."⁵ "Mistake must be established by such force of proof as leaves no rational doubt of fact."⁶ Mistake must be shown "beyond a reasonable doubt."⁷ Evidence "must be clear, precise and indubitable."⁸

§ 349. Measure or quantum of proof — Continued.— Some further illustrations are given where it is sought to reform a written instrument on the ground of fraud, accident or mistake.⁹ Now that parties are competent as witnesses, and each may oppose his oath to the other's when written instruments are sought to be impeached on grounds purely equitable, the reason is stronger than ever for enforcing the rule as to the *quantum* of proof required.¹⁰ "Evidence must be clear, unequivocal and decisive."¹¹ Evidence "must leave no reasonable doubt."¹² "It requires the strongest and clearest evidence to establish the mistake."¹³ Must be of the "clearest and most satisfactory character."¹⁴ "Must be a plain mistake clearly made out, entirely to the satisfaction of the court."¹⁵ "The

¹ Bunsen v. Agee, 47 Mo. 270.

² Selby v. Geines, 13 Ill. 69, 71.

³ Miner v. Hess, 47 Ill. 170.

⁴ Ruffner v. McConnell, 17 Ill. 212, 216, 63 Am. Dec. 362; Wyche v. Greene, 11 Ga. 159, 171; Iverson v. Hutton, 98 U. S. 79, 82; Mendenhall v. Steckel, 47 Md. 453, 465, 28 Am. R. 431; 1 Story's Eq. Juris., § 157; Thompson v. Fullinwider, 5 Ill. App. 551; Cleary v. Babcock, 41 Ill. 271; McDonald v. Starkey, 43 Ill. 442; Smith v. Jordan, 13 Minn. 264, 97 Am. Dec. 232; Trapp v. Moore, 21 Ala. 698, 697; Cummins v. Bulgin, 37 N. J. Eq. 476.

⁵ Hinton v. Citizens' Mut. Ins. Co., 63 Ala. 483, 498.

⁶ Rowley v. Flannely, 30 N. J. Eq. 612, 614.

⁷ Muller v. Rhuman, 62 Ga. 332, 336; Stockbridge Ins. Co. v. Hudson R. Ins. Co., 103 Mass. 45, 49; Fudge v.

Payne, 86 Va. 303, 307, 10 S. E. 7; 1 Story's Eq. Juris. (13th ed.), p. 153, note.

⁸ Murray v. New York, etc. R. R. Co., 103 Pa. St. 37, 43; Sylvius v. Kosek, 117 Pa. St. 67, 76, 11 Atl. 392, 2 Am. St. 645.

⁹ Id.

¹⁰ Juniata Building Ass'n v. Helzel, 103 Pa. St. 507, 514; Phillips v. Meily, 106 Pa. St. 536, 543; Sylvius v. Kosek, 117 Pa. St. 67, 76, 11 Atl. 392, 2 Am. St. 645.

¹¹ Wall v. Arrington, 13 Ga. 88, 95; United States v. Munroe, 5 Mason, 572, 577, Fed. Cas. 15,835.

¹² Fuchs v. Treat, 41 Wis. 404, 406.

¹³ United States v. Munroe, 5 Mason, 572, 577, Fed. Cas. 15,835; Wall v. Arrington, 13 Ga. 88, 95.

¹⁴ Palmer v. Converse, 60 Ill. 313.

¹⁵ Beard's Ex'r v. Hubble, 9 Gill (Md.), 420. See the authorities reviewed in this case.

strongest and most convincing evidence will be required. "Evidence must be such as to leave no fair and reasonable doubt."¹ "Proof should clearly make out the mistake and should 'strike all minds as being unquestionable and free from reasonable doubt.'"² "Proof ought to be strongest possible."³ "There ought to be the strongest proof possible."⁴ "The evidence should be strong, irrefragable evidence."⁵ "Proof must establish the mistake beyond reasonable controversy."⁶ In Maryland the courts have held that, while there is to be found much conflict in authorities in cases outside of that state as to the *quantum* of proof that will justify a court of equity in the correction of a mistake in a written instrument, yet the rule there is, "*that only such evidence and strict evidence is required as will be sufficient to satisfy the mind of the court.*"⁷ It rests upon the party alleging mistake to overcome the strong presumption that the written instrument correctly expresses the intention of the parties. If the proofs are doubtful and unsatisfactory, if there is a fair doubt, to overcome this presumption by testimony entirely plain and convincing beyond controversy, the writing must be shown to express correctly the intention of the parties. The solemnity of deliberate written contracts must not be brushed aside by loose and inconclusive evidence.⁸ Where the evidence is a demonstration of mistake, is doubtful or equivocal, or is contradicted, so that it is impossible for the mind to arrive at a strong conviction of the truth, the court will not change the instrument as written.¹⁰ Every presumption is in behalf of the correctness of the writing. "Written instruments are made to give effect to the agreements of parties, and the safety of commu-

¹ Judge Breece in *Hunter v. Bilyeu*, 30 Ill. 228.

² *Hamlon v. Sullivan*, 11 Ill. App. 423, 433; *Sutherland v. Sutherland*, 69 Ill. 481, 488; *Douglas v. Grant*, 12 Ill. App. 273, 278.

³ *Hervey v. Savery*, 48 Iowa, 313, 319; *Edmonds' Appeal*, 59 Pa. St. 220, 222.

⁴ *Townshend v. Stangroom*, 6 Ves. 328; *Tucker v. Madden*, 44 Me. 206, 215.

⁵ *Henkle v. Royal Assurance Co.*, 1 Ves. Sr. 317, 319.

⁶ *Shelburne v. Inchiquin*, 1 Ch. Cas. 338, 341.

⁷ *Hileman v. Wright*, 9 Vt. 128; *Shattuck v. Gay*, 45 Vt. 128.

⁸ *Coale v. Merryman*, 35 Md. 486; *Showman v. Miller*, 6 Md. 486.

⁹ *Howland v. Blake*, 97 Vt. 628.

¹⁰ *Rowley v. Flannelly*, 30 Vt. 612, 614, and many cases cited in the opinion; *Cummins v. Bulger*, 1 J. Eq. 476.

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quires allegations of mistakes in them should be regarded only where the evidence is clear, free from suspicion, and entirely satisfactory."¹ For this reason courts of equity, where parol proof is relied upon to establish a mistake in a written instrument, proceed with great caution, and, where the mistake is denied, never make such proof the foundation of a decree, except it be of the clearest and most satisfactory character.²

In conclusion we may safely say that, while the courts use different language in attempting to define the *quantum* of proof necessary, yet they all concur in the fact that parol proof is competent, and that those who undertake to rectify a written instrument by showing a mistake by such proof undertake a task of great difficulty.³ Judge Story, in summing up this matter, says, speaking of the rule that equity will only grant relief in cases "where there is a plain mistake clearly made out by satisfactory proofs," that "it is true that in one sense this leaves the rule somewhat loose, as every court is still left free to say what is a plain mistake, and what are proper and satisfactory proofs," for in many cases different judges will differ as to the result and weight of evidence, and consequently they make different decisions upon the same evidence.⁴ Lord Eldon says: "This inconvenience belongs to the administration of justice; that the minds of different men will differ upon the result of the evidence, which may lead to different decisions upon the same case."⁵ That is, in different cases the courts come to different conclusions upon the same evidence. This "inconvenience" runs through every branch of the administration of justice. One jury will convict while the next will acquit upon the very same evidence; but in the reformation of written instruments this "inconvenience" is intensified because of the fact that courts are unable to agree upon the *quantum* of evidence required by law. But where a mistake is once shown to the court by the necessary *quantum* of proof, or is admitted, then a preponderance may be sufficient to show

¹ Adams v. Robertson, 87 Ill. 45, 64.

² Snell v. Insurance Co., 98 U. S.

85, 90.

³ Gillespie v. Moon, 2 Johns. Ch. 585,

593, 7 Am. Dec. 559; Townshend v.

Stangroom, 6 Ves. 328; Gelpcke, Wins-

low & Co. v. Blake, 15 Iowa, 387, 389,
83 Am. Dec. 418; Tucker v. Madden,
44 Me. 206, 215.

⁴ 1 Story's Eq. Juris., § 157.

⁵ Townshend v. Stangroom, 6 Ves.
328, 333.

what was intended to be inserted in the place of the erroneous matter.¹

§ 350. Measure or quantum of proof—Continued frequently becomes a question as to the *quantum* of proof required in a civil case, where it is necessary, under the pleadings, to the maintenance of the plaintiff's cause of action or the defendant's defense, to show that the opposite party has been guilty of a criminal offense. In Illinois it has been held in such cases that such offense must be proved beyond a reasonable doubt.² But even in that state, and in other jurisdictions where it is held that the charge must be proven beyond a reasonable doubt, to justify the application of the rule in such things are necessary:

1st. The pleadings must charge and the party must show the commission of a crime.³

2d. An infamous crime must be charged, such as perjury, larceny, arson, and the like. The rule does not extend to charges which are merely fraudulent.⁴

In some Illinois cases the rule has been modified in its application or otherwise questioned. In a late case the supreme court of that state allude to the previous cases holding that extreme proof to be required and then add: "If this rule is to be adhered to, in respect of which we express no opinion," thus implying at least a doubt as to the propriety of this rule. In a still later case in the appellate court,⁵ after calling attention to the earlier cases laying down the strict rule, the court say: "So far as this state is concerned, therefore, it is to be still an unsettled question as to whether or not,

¹ Bunse v. Agee, 47 Mo. 270.

² Crandall v. Dawson, 1 Gilm. 556, 258; Darling v. Banks, 14 Ill. 46; McConnell v. Delaware Mut. Ins. Co., 18 Ill. 228, 233; Crotty v. Morrissey, 40 Ill. 477, 480; Harbison v. Shook, 41 Ill. 141, 147; Sprague v. Dodge, 48 Ill. 142, 144, 95 Am. Dec. 523; Corbley v. Wilson, 71 Ill. 209, 218, 23 Am. Rep. 96; Germania Ins. Co. v. Klewer, 129 Ill. 599, 613, 23 N. E. 489.

³ Sprague v. Dodge, 48 Ill. 142, 144, 95 Am. Dec. 523; First Nat. Bank v. Sanford, 83 Ill. App. 58, 62; Sinclair

v. Jackson, 47 Me. 102, 107, 108, Dec. 476; Schmidt v. N. Y. Mut. Ins. Co., 1 Gray (Mass.), 52; Grimes v. Hilliary, 150 Ill. 141, 36 N. E. 979; Shepherd v. Roberts, 83 Ill. App. 821.

⁴ First Nat. Bank v. Sanford, 83 Ill. App. 58, 62; Grimes v. E. 150 Ill. 141, 143, 36 N. E. 977.

⁵ Grimes v. Hilliary, 150 Ill. 141, 143, 36 N. E. 977.

⁶ Roberts v. Woods, 83 Ill. App. 646-47.

criminal offense is charged in a civil case, it is necessary to prove the charge beyond a reasonable doubt."¹ In *Oliver v. ...*, 110 Ill. 119, and 119 Ill. 532, the court simply held the complainant's proof to be insufficient to justify a recovery without stating the degree of proof required, that is to say, that the plaintiff was bound to establish the charge by clear and convincing evidence. The crime of forgery in erasing the name of another and putting his own as grantee in a deed did not necessarily constitute a charge of crime, because he might have committed the act in good faith under the belief that he had the right so to do. In the former case the same court said that "it has been held that the offense charged must be proved beyond a reasonable doubt." Then, after quoting cases,² they add that clearer proof is required than in one involving no criminality, but that the court would err if it held it necessary to establish the truth of the charge beyond a reasonable doubt.³

It is even in those courts where the most rigid rule obtains requiring the charge to be established beyond a reasonable doubt, it is held only to apply to cases where the charge of criminality is made in the pleadings.⁴ It is said, therefore, that it does not follow that because an element may have entered into an act which would have rendered it indictable as a crime, but which is not alleged or necessary to be proved to entitle a recovery in a civil action, the proof must be made beyond a reasonable doubt.⁵ In an early Illinois will case the defendant was squarely charged with the crime of arson, and incidentally with the crime of perjury, to defraud an insurance company. Of the measure of proof required of the complainant the supreme court of that state say: "In such a case every presumption is in favor of his innocence, and we should

¹ Cases limiting or throwing doubt upon the rule, see *Sprague v. ...*, 48 Ill. 142, 95 Am. Dec. 523; *Oliver v. ...*, 110 Ill. 119; *Riggs v. ...*, 142 Ill. 453, 32 N. E. 482; *Grimes v. Hilliary*, 150 Ill. 141, 36 N. E. 977; *Shepherd v. Royce*, 71 Ill. 521; *Roberts v. Woods*, 82 Ill. 630; *First Nat. Bank v. San-*, 13 Ill. App. 58.

Randall v. Dawson, 1 Gilm. (Ill.) 1; *Marbison v. Shook*, 41 Ill. 141.

² *Sprague v. Dodge*, 48 Ill. 142, 95 Am. Dec. 523.

³ *Sprague v. Dodge*, 48 Ill. 142, 144, 95 Am. Dec. 523; *Sinclair v. Jackson*, 47 Me. 102, 74 Am. Dec. 476; *Schmidt v. New York Mut. Fire Ins. Co.*, 1 Gray (Mass.), 529.

⁴ *Riggs v. Powell*, 142 Ill. 453, 32 N. E. 482; *Grimes v. Hilliary*, 150 Ill. 141, 146, 36 N. E. 977.

not, by our finding, pronounce him guilty, unless that guilt is clearly established by evidence excluding or overcoming a fair and reasonable hypothesis of his innocence."¹ Where the defendant denies the execution of the note sued on, his denial does not necessarily charge the plaintiff with forgery, and does not put upon the defendant the burden of proving his innocence beyond a reasonable doubt.² In chancery where the charge is that a party committed a fraudulent act not amounting to a crime, the rule requiring the charge to be proven beyond a reasonable doubt does not apply. This rule has been held to apply only where some infamous crime is charged, such as perjury, larceny, arson, and the like.³ The "beyond a reasonable doubt" doctrine is generally repudiated.⁴

§ 351. *Weighing the testimony of witnesses.*—To enable a master to judge of the weight of the testimony given by witnesses orally, he of course should be present at their examination. It is not an uncommon practice for the master to swear the witnesses and then absent himself from the examination while the examination proceeds, a stenographer taking down the evidence in his absence. To prevent this objectionable practice, a New Jersey chancery rule provides that where evidence is taken down by another person, the master must certify that the testimony was written in his immediate presence and hearing, and was accurately taken from the lips of the witness. The rule further provides that, when the examination is taken by a stenographer, the latter must be sworn to him faithfully and truly to take stenographically and to reduce a manuscript or typewriting of the testimony given, and also certify that the testimony was taken in his immediate presence and hearing by a stenographer sworn as above required, and that he believes that they accurately state the evidence given.⁵ But, independently of any rule of

¹ *McConnel v. Delaware M. & Ina. Co.*, 18 Ill. 229, 232, 233.

² *Shepherd v. Royce*, 71 Ill. App. 821.

³ *First Nat. Bank v. Sanford*, 83 Ill. App. 58, 62. On the measure of proof required where a crime is charged in a civil case, see, further, *Grimes v. Hilliary*, 150 Ill. 141, 146, 56 N. E.

977, and cases cited; *Barton v. Thompson*, 46 Iowa, 30, 26 Am. L.

Robinson v. Randall, 82 Ill. 521; *v. Dawson*, 46 Iowa, 538; *Pole v. See*, 54 Mo. 291.

⁴ See 1 Greenl. Ev. (16th ed.), note 4, p. 161.

⁵ N. J. Ch. Rule, No. 44.

upon the master, it is one which he has guard. He is paid for his time, and as action he has no more right to absent himself during the taking of the testimony than the court room upon a trial before him to proceed in his absence. In a recent supreme court condemned this practice in a credit to be given to the testimony of an or to the whole mass combined, varies so isability of examining them and the topics must be dictated by the facts of each case, mon sense.¹ Yet a few general suggestions to the master in determining the degree of arded to the testimony of a witness, or a and in attempting to elicit the truth from ig evidence. These suggestions naturally ses: *First*, those which give credence to the itness, or in other words add to the credi- ony, and *second*, matters of an infirmative the discredit of his statements.

es us four valuable hints that will prove r in determining whether certain witnesses ot.

ch renders the testimony of a witness doubt- n of the several circumstances, and yet no f those circumstances, to fall in with what render such a witness (standing alone with- oof) to be very much suspected, and there dence in the integrity, and veracity, of the ay circumstances on one man's single testi- were true, there might be a multitude of o strengthen and confirm the evidence."

r thing that would render his testimony giving the reasons and causes of his knowl- i could give the reasons and causes of his s not, he is forsworn; because he is obliged th, and by consequence he is of no credit;

¹, 185 Ill. 476, 57 N. E. 652. See also ante, § 214.
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and that a man should know anything and not be able to tell how he comes to know it, is incredible."

Third. "The same may be said as to persons who take upon them to remember things long since transacted; for if the matter be frivolous they ought to tell the causes of their memory; otherwise the memory is little to be credited, for they are rather to be supposed as rash persons, who take upon them to swear what they do not perfectly remember, than that they are really under the awe, or conscience, of an oath, for then they would be able to tell the reason and certain marks of their remembrance."

Fourth. "Another thing that may render a witness suspicious is in the person himself; as if he were a party to the cause, or swears for his own safety or indemnity; or be a relation or friend to the party, or the like, or be of a profligate or wild temper or disposition; and the weight of the probability is thus; if you think the bias is so strong upon him as would incline a man of his disposition, figure and rank in the world to falsify, you are to disbelieve him; but if you think him a man of that credit and veracity, that notwithstanding the bias upon him, would yet maintain a value for truth, and is under the force and obligation of his oath, he is to be believed."¹

§ 352. *Weighing the testimony of witnesses* — Continued.— In weighing the testimony of witnesses for the purpose of forming conclusions of fact, while the number of witnesses examined is a consideration, always to be looked upon, yet that of itself is by no means to be regarded as a controlling one. There are many other equally important tests of truth, chief of which is that of a cross-examination in the presence of the court, master or jury. The witness' manner, demeanor and bearing upon the stand,—his replies, whether frank and open or reluctant and evasive,—his manner of expressing himself, whether moderate, dignified and respectful on the one hand, or extravagant, impertinent and reckless on the other,—his intelligence and means of information with respect to the matters of which he speaks,—his relation to the parties to the suit,—his interest in the question between them or in the subject-matter of the suit,—are always of vital

¹ Gresley's Eq. Ev. 471, 472.

in determining to what, if any, credit the witness is

These considerations are essential elements in every investigation through the instrumentality of witnesses. They are among the great lights and aids that enable the trier of fact or master to arrive at the truth.¹ Therefore, in giving the weight to be given to the testimony of a witness, attention should be given to his manner while testifying, because his manner and demeanor frequently afford valuable aids in determining the degree of credibility to be given to what he says. As said by Starkie: "Manifestations of excessive confidence and zeal beyond those which the occasion naturally requires, over-forwardness in testifying that which will benefit the cause, and ill-concealed reluctance in declaring that which is contrary to his prejudice, flippancy and levity of manner, coldness and apathy in describing injuries which would naturally excite a contrary feeling, indications of subtlety, artifice and dissimulation, are, with a multitude of others, tests for estimating the character of a witness and the value of his testimony."² In addition to these tests the trier of fact, where the testimony of several witnesses is conflicting, should consider the integrity of the witnesses, their means of knowledge, the consistency and probability of their statements with each other and with undisputed facts and circumstances in the case. The various statements made by the witnesses, if they occurred as represented, necessarily be consistent with each other. Apparent discrepancies are always capable of being reconciled, because every fact must be, in the very nature of things, consistent with every other fact however remote in place or time. Every detail must fit in with every other fact, and requires no invention on the part of the witness to produce it. Where details are the result of fabrication on the part of the witness, memory and invention are constantly at work to produce or bring about apparent harmony, and this is one of the most fruitful fields for the skilful cross-examiner. The false witness may have no difficulty in repeating, like the principal fact which he understands is debatable, the fact established by the party he is attempting to assist, but

Illinois & St. L. R. R. & C. Co. v. Ogle, 92 Ill. 353, 361, 362.

¹ Starkie on Ev., § lxxxiv.

the moment he is drawn aside and his invention tends to produce details which will harmonize with his fabrication, is so sparing in details as to create suspicion, or he tries to do so by some statement absolutely inconsistent with the statement of the chief.¹ Where a witness is wholly disinterested, is not interested in details, nothing alleged against his truthfulness, and his statement is consistent with the natural probabilities of the case, the master is not only justified but required to accept and act on it, and especially if corroborated by other credible witnesses.

§ 353. Weighing the testimony of witnesses — C. As a rule affirmative evidence is entitled to greater weight than negative evidence,² but, under certain circumstances, negative evidence is entitled to equal weight. For example, where two persons are present and both claim to have seen what was done, and one affirms and the other denies, the denial is considered as affirmative;³ or it may be even of superior weight.

§ 354. Weighing the testimony of witnesses — C. The conduct of a party or a witness may be of importance in weighing the testimony. Thus the spoliation, fabrication, or even the withholding of important evidence by a party, may aid the master in arriving at his conclusions of fact. The presumption being in the first two cases mentioned that the party must have a bad case who resorts to such means, and in the last that if the evidence withheld were produced it would be against the party withholding the same.

The maxim of the law is *Omnia præsumuntur contra reum* — "Every presumption is against the wrong-doer." In forming conclusions of fact it is proper for the master to take into consideration the omission of a party to testify

¹ 1 Starkie on Ev., § lxxxv.

² Griffin's Appeal, 109 Pa. St. 150, 156.

³ Stitt v. Huidekopers, 84 U. S. (17 Wall.) 884; Georgia P. R. R. Co. v. Freeman, 83 Ga. 588, 10 S. E. 277.

⁴ Coughlin v. People, 18 Ill. 266, 68 Am. Dec. 541; C. & Q. R. R. Co. v. Cauffman, 38 Ill. 424; Rockford, R. I. & St. L. R. R. Co. v. Hillmer, 72 Ill. 285; C. & Q. R. R. Co. v. Lee, 87 Ill. 454; C. & A. R. R. Co. v. Pelligreen, 65 Ill. App. 882.

⁵ Coughlin v. People, 18 Ill. 266, 68 Am. Dec. 541; Murphy v. Ill. 59; Reeves v. Poindexter, 308; Delk v. State, 8 Hea-

son v. State, 14 Ga. 55; M. State, 67 Ga. 638; Moon v. Ga. 637.

⁶ Armory v. Delamirie, 1004; Woodman v. Nottin, H. 387, 6 Am. R. 526; 4 Smith, 1 La. An. 1.

or explanation of testimony given by others in his presence.¹ So, too, where it is shown that a party has witnesses in court, who have knowledge of material facts which would qualify or explain evidence given by his adversary's witnesses, a failure to call such witnesses is a subject for consideration.²

Whatever inferences may be drawn against a party by reason of his failure to produce evidence in his possession or under his control are allowed on the theory that he wilfully withholds such evidence. His conduct, says Greenleaf, is attributed to his supposed knowledge that the truth would have operated against him.³ He is treated in law as a "spoliator of evidence."⁴ To smother evidence is not much better than to fabricate it. A party who shuts the door upon a fair examination must suffer the consequences of any honest indignation which his conduct may excite. The presumption in *odium spoliatoris* is perfectly legitimate. It is so natural and so just that it is a part of every civilized code.⁵ Best, in his learned work on Evidence, very justly observes that "it has been made the subject of very fair and legitimate doubt whether it has not occasionally been carried too far."⁶ If the evidence offered is imperfect, vague and uncertain as to dates, sums, boundaries, etc., every intentment and presumption is against the party who might remove all doubt by producing the higher evidence.⁷ A familiar illustration of this presumption against a party who has it in his power to produce evidence, but deliberately refuses so to do, is the case of the chimney-sweep, who, finding a jewel, took it to a jeweler to ascertain its value. The jeweler took the stone from its setting and kept it, offering the boy three half-pence

¹ McDonough v. O'Neil, 118 Mass. 92, 96.

² Whitney v. Bayley, 4 Allen (Mass.), 173, 175; Com. v. Clark, 14 Gray, 367, 373.

³ 1 Greenl. Ev., § 87.

⁴ Lawson, Presumptive Ev., p. 120 *et seq.*; Cartier v. Troy Lumber Co., 138 Ill. 533, 536, 28 N. E. 982, 14 L. R. A. 470.

⁵ Lawson, Presumptive Ev. 127; Black v. Wright, 9 Ired. L. 447, 481. For a full discussion of this rule together with its limitations, in addi-

tion to the authorities cited above, see 2 Best on Ev., § 411 *et seq.*; 1 Thompson, Trials, § 794, and large number of authorities cited in briefs in Cartier v. Troy Lumber Co., 138 Ill. 533, 536, 14 L. R. A. 470 and note.

⁶ Best on Ev., § 414.

⁷ Life & Fire Ins. Co. v. Mechanics' Fire Ins. Co., 7 Wend. 31, 34; Rector v. Rector, 8 Gilm. (Ill.) 105, 119, 120; Cartier v. Troy Lumber Co., 138 Ill. 533, 28 N. E. 982, 14 L. R. A. 470 and note.

for it. Upon the hearing the court instructed the jury "unless the defendant did produce the jewel and show it to be of the finest water, they should presume the story against him and make the value of the best jewels the measure of the damages, which they accordingly did."¹ When a party fails to call a witness whom he would naturally be expected to call, and where the failure would create in the mind of the court, jury or master an inference that he was not called because his testimony would be unfavorable to such party, the latter is entitled to show his inability to produce the witness by proof that he is dead, or that his whereabouts are unknown, or, in a criminal case, that he has gone where process cannot be served to compel his attendance.²

§ 355. Weighing the testimony of witnesses — Continued. In cases where the evidence depends upon opinion of witnesses the master is not bound to accept as correct and governed by such opinions. Such evidence may relate to the value of property, the value of professional or other services, or the amount of damages to be awarded a party in a particular case.³ For example, where the question is as to the value of professional services, the master is not bound by the opinion of witnesses, but may exercise his own judgment on the subject, taking into consideration the nature of services, or the time required to perform them, and all the attendant circumstances. Such opinions are competent to assist the master in reaching a correct conclusion, but are not conclusive. If they are conclusive the reference to a jury or master would be a mere ceremony. There are innumerable instances where undoubted testimony of this character has been disregarded

¹ *Armory v. Delamirie*, 1 Strange, 505; s. c., Bigelow, L. Cases on Torts, 368; s. c., Shirley, Leading Cases, 232. As to what just inferences may be drawn against a party who fails or refuses to produce books and papers, upon notice, in a chancery proceeding, see *Life & Fire Ins. Co. v. Mechanics' Ins. Co.*, 7 Wend. 81, 84; *Rector v. Rector*, 8 Gilm. (Ill.) 105, 119, 120; Best on Ev. 414, note.

² *Parker v. People*, 94 Ill. App. 648, 652; *Mantonya v. Reilly*, 83 Ill. App.

275; *Rector v. Rector*, 8 Gilm. Underhill on Ev. 16; 1 Greenl. § 87.

³ As to when expert or opinion evidence is admissible, see ante, 241.

⁴ *Baker v. Richmond City Works*, 105 Ga. 225-227, 81 S. E. 200; *Moore v. Ellis*, 89 Wis. 109, N. W. 291; *Anthony v. St. Louis Mining Co.*, 106 Ga. 516, 518, 81 S. E. 601.

where, upon a conflict, the trial court has declined to follow the testimony offered on either side, and its action in this regard has been approved by the appellate courts.¹ While the master cannot act in any case upon particular facts material to the issue resting in his private knowledge, but should be governed by the evidence adduced, yet he may, and to act intelligently must, judge of the weight and force of that evidence by his own general knowledge of the subject of inquiry.² Matter of opinion is entitled to no weight with a court or jury unless it comes from persons who first give satisfactory evidence that they are possessed of such experience, skill or science in such matters as entitles their opinions to pass for scientific truth.³ In weighing the value of an opinion given by an expert witness it must be kept in mind that it is only the opinion of the witness that is competent as evidence.

Justice Campbell, of the supreme court of Michigan, says:

"No one has any title to respect as an expert, or has any right to give an opinion upon the stand, unless as his own opinion; and if he has not given the subject involved such careful and discriminating study as has resulted in the formation of a definite opinion he has no business to give it. Such an opinion can only be safely formed or expressed by persons who have made the subject and questions involved matters of definite and intelligent study, and who have by such application made up their own minds. In doing so it is their business to resort to such aids of reading and study as they have reason to believe contain the information they need. This will naturally include the literature of the subject. But, if they have only taken trouble enough to find, or suppose they find, that certain authors say certain things, without further satisfying themselves how reliable such statements are, their own opinions must be of very moderate value, and, whether correct or incorrect, cannot be verified to a jury by statements of what those authors hold on the subject."⁴

¹ *United States v. Phillips* (C. C. A., 8th Ct.), 107 Fed. 824, 826; *Head v. Hargrave*, 105 U. S. 45, 49. See post, § 648. 102. See also 1 *Thomp. Trials*, sec. 880, p. 842.

² *Head v. Hargrave*, *supra*; *Winkler v. Railroad Co.*, 21 Mo. App. 99,

³ *Foster, J.*, in *Dole v. Johnson*, 50 N. H. 452. For illustrations, see *Lawson, Expert and Opinion Ev.*, p. 196.

⁴ *People v. Millard*, 53 Mich. 63, 76.

It is a rule of law that in weighing the value of evidence, a large amount of theory can overcome facts established by credible testimony, hence, neither the court or master should allow his opinion to control as against a fact proven by competent testimony.¹ "No theory can change the facts, and we need not the aid of science to confirm the proofs of eye-witnesses."² A witness may testify with great positiveness and yet the master may see that he is testifying to conclusions rather than facts. In such a case the master may be justified in wholly disregarding his evidence.³

§ 356. Weighing the testimony of witnesses — Continued.— In determining the truth or falsity of any given proposition, whether in the ordinary affairs of life or in judicial investigation, the first question we ask of ourselves is: Is it reasonable, is it probable, how does it agree with our experience, and what we already know by observation? By probability is meant the likelihood of anything to be true, deduced from its conformity to our knowledge, observation and experience.⁴ Viewed from this standpoint a thing may be so probable, so reasonable, that it could hardly be otherwise, that slight evidence is required to convince the mind of its truth, or it may be so improbable as to require strong and convincing proof to give it credence; or again, it may be so repugnant to the known and immutable laws of nature, that no amount of evidence could induce us to believe it, in which case such supposed fact is said to be *impossible*, or *physically impossible*.⁵ Whether conscious of the fact or not, this element enters into the solution of every problem, whether in court or out of court, where the question is: Does the proof establish the truth of the allegation made by the proponent? Mr. Starkie says: "In judicial investigations, as well as in the ordinary course of life, that is more or less probable and probable and is therefore, in a greater or less degree, an inducement to belief, which more or less agrees with former observations. This is a ground of assent, warranted as well by philosophy as by ordinary experience. It is probable that whatever

¹ *People v. Millard*, 53 Mich. 68, 77.

² *Treat v. Bates*, 27 Mich. 390, 396.

³ *Insurance Co. v. Fosta*, 79 Mich. 372.

⁴ *Best on Ev.*, § 34.

⁵ *Id.*

happened will again happen under similar circumstances, however ignorant we may be of the nature or necessity of the connection; the very frequency of the association is evidence of the connection; there is no association whatsoever, whether it be moral, natural or artificial, whether it depend on the nature or constitution of the human mind, the laws of nature, or the artificial manners and habits of society, which is not rendered probable in proportion to the frequency and constancy of the connection. Hence it is that where circumstances, found to be usually associated with the fact in question, are known to exist, such associations are connecting links between the known circumstances and the fact, and render its existence more or less probable."¹

The evidence offered in support of a proposition may not of itself be of a character to commend it or to carry conviction, yet the proposition itself may be so probable, so reasonable in the light of all the surrounding circumstances, that no other proof is required to establish it. This observation applies as well to acts depending upon human agency as to facts in the material world. "Experience points out some laws of human conduct almost as general and constant in their operation as the mechanical laws of the material world themselves are. That a man will consult his own preservation, and serve his own interests; that he will prefer pleasure to pain, and gain to loss; that he will not commit a crime, or any other act manifestly tending to endanger his person or property, without a motive; and conversely, that if he has done such an act he had a motive for doing it, are principles of action and conduct so clear that they may be regarded as axioms in the theory of evidence."² At times we find men doing things which turn out to be directly against their interest, but these turn out upon examination to be no exception to the rule. The example of the murderer who, using a portion of a letter as wadding for his pistol, putting the remainder in his pocket, and that of the burglar who, breaking the point off his knife in prying open a window, putting the knife back in his pocket, each of them thus carefully preserving the evidence which afterward was used to secure their conviction, was no excep-

¹ Starkie on Evidence, vol. 1, § lxx.

² Id., § lxxvii.

tion to the rule, because their acts were not the result of intention but oversight.¹

This rule of the probable or improbable applies with equal force to the character and habits of the lower animals as to man. That certain birds are solitary in their habits, while others are gregarious; that some are carnivorous, while others are not; that certain carnivorous animals follow their prey by sight, while others depend on the sense of smell, are well known facts in natural history, and any statement of a witness at variance with any one of these propositions would be improbable and not in accord with our observation and experience. Another fact may be here noted, that is, that a statement probable and reasonable at one time may be improbable and unreasonable if made at another, or under a different state of circumstances. For example, a statement of a witness that, in the year 1850, he saw, upon the plains of the west, tens of thousands of buffaloes in a single drove, or that he saw in the beech woods of Indiana a similar number of wild pigeons, would be recognized as probable and reasonable, while if he should say that he saw the same sight in the year 1900, his statement would be looked upon as incredible. To state as the historian does that Cæsar was able to travel at the rate of one hundred miles a day with hired carriages,² is reasonable and probable, but had the same historian stated that he traveled at the rate of sixty miles an hour his veracity would be called in question, while to say of the present king of Italy that he can to-day travel at the latter speed accords with our knowledge derived from experience and observation. Sometimes, too, the statement of a single fact by way of explanation renders that reasonable and probable which otherwise is unreasonable. For example, a statement by a witness that he saw fowls going to roost at mid-day is extremely probable when he adds that it was during an eclipse of the sun. But after all there is a degree of uncertainty in the practical application of this doctrine of probability, because of the difference in the knowledge and experience of different individuals. Judge Best, in his admirable work on Evidence, says: "As the knowledge, observation and experience of men vary in

¹ Starkie on Ev. 485, 486; Burrill, Cir. Ev. 272-73; Best on Pres., § 218;
² Bentham, Jud. Ev. 256.

² Gibbon's *Mis. Works*, vol. 2, p. 323.

every imaginable degree, these notions of possibility and probability might naturally be expected to differ; and we continually find that, not only are the most opposite judgments formed as to the credence due to alleged facts, but that a fact which one man considers both possible and probable, another holds to be physically impossible."¹ To Galileo the theory that the earth turned upon its axis and also revolved around the sun was not only probable but susceptible of demonstration, while to the great mass of the people of his generation it was not only improbable but heresy so rank that he deserved death at the stake. To Sir Mathew Hale the existence of witchcraft was not only probable but proven by holy writ. To show how different the conclusions of men may be, when they fall back on experience and observation as their guide, we have only to recall the story of the king of Siam, so often quoted, who believed everything the Dutch ambassador told him about Europe, until he mentioned that the water there in the winter became so hard that men, horses, and even an elephant, could walk on it, which that monarch at once pronounced a palpable falsehood.²

§ 357. *Weighing the testimony of witnesses — Continued.* A witness may be wholly uncontradicted by any other and yet be discredited by his own statements. He may be as effectually impeached by the facts he himself states as by facts stated by others. Mitchell, J., speaking for the supreme court of Minnesota, says of a case of this character:

"The rule undoubtedly is, that where the positive testimony of a witness is uncontradicted and unimpeached, either by positive testimony or by circumstantial evidence, either intrinsic or extrinsic, it cannot be disregarded, but must control the decision of the court or jury. But a witness may be contradicted by the facts he states as completely as by direct adverse testimony. A court or jury is not bound to accept it as true merely because there is no direct testimony contradicting it, where it contains such inherent improbabilities or contradictions which alone, or in connection with other circumstances in evidence, satisfy them of its falsity."³

¹ Best on Ev., §§ 24, 25.

² In *Anderson v. Liljengren*, 50

³ Locke, *Human Understanding*, Minn. 3, 4, 52 N. W. Rep. 219, Bk. 4, ch. 15, § 5; Best on Ev., § 25.

To the same effect Mr. Justice Fields, of the United supreme court, in a case where a Chinaman's testimony was impeached except by the improbability of his statements

"Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the court. But that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct contradictory testimony. He may be contradicted by the facts he states completely as by direct adverse testimony, and there may be so many omissions in his account of particular transactions of his own conduct as to discredit his whole story. His manner, too, of testifying may give rise to doubts of his sincerity, or create the impression that he is giving a wrong color to the material facts. All these things may be properly considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony introduced."¹

Where the physical condition indicates that a witness may be mistaken his testimony may be disregarded.² Evidence to be worthy of credit, must not only come from a credible source but must, in addition, be credible in itself. By this it is meant that it shall be so natural, reasonable and probable, in view of the transaction which it describes or to which it relates, as to make it easy to believe.³

§ 358. Weighing the testimony of witnesses — Continued. In attempting to ascertain the truth where the evidence is conflicting, great importance should be given to the circumstances, a fact too often overlooked by judges, jurors, masters and others whose duty it is to weigh testimony. This is well illustrated by the court of chancery of Ontario as follows: "The proneness with some, at any rate, of the masters of the

¹In the case of *Quock Ting v. United States*, 140 U. S. 417, 420, 11 Sup. Ct. R. 733. See also *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549, 553, 6 Am. R. 140; *Kavanagh v. Wilson*, 70 N. Y. 177, 179; *Koehler v. Adler*, 78 N. Y. 287, 291; and as to this whole section see *Podolski v. United States*, 186 Ill. 540, 547, 58 N. E. 840.

²*Blakeslee's Express & Va. Ford*, 90 Ill. App. 187, 141; *J. Ice Co. v. Zwicokoski*, 78 Ill. 646, and cases cited.

³*Vreeland v. Vreeland*, 48 N. Y. 55, 66.

to give overmuch weight to oral testimony, and too little weight to conduct and to circumstances. The tendency of almost all minds is to place faith in witnesses whose appearance and bearing indicate truthfulness; but circumstances may show that witnesses apparently truthful are really false, and no one who has been conversant with the examination of witnesses can fail to have observed how his faith in an apparently truthful witness has been shaken upon his being subjected to the test of a searching cross-examination, or confronted with the evidence of other witnesses, or with proved circumstances; when, if his evidence had been left unassailed, it would have been considered perfectly reliable. Conduct and circumstances are crucial tests of the truthfulness of testimony, and should be very carefully considered, and due weight should be given to them by those who, in a judicial position, have to draw their conclusions upon matters of fact from all the evidence, of whatever nature, that is before them."¹

Having obtained a clear and distinct understanding as to what the issues are, upon whom the burden of proof rests, what the measure or *quantum* of proof required is, and what the exact facts are as shown by the evidence, the next question is: What is the law applicable thereto?

III. FINDINGS OF LAW.

§ 359. Master's conclusions or findings of law.—The rule laid down by Chancellor Kent for determining the law applicable to the facts as found is a good one to be followed by the master. He says that, having concluded this part of his labor (determining the facts), he then saw where justice lay, that the moral sense decided the cause half the time, and that he then searched the authorities until he exhausted his books, once in a while finding some technical rule that embarrassed him, but generally finding *principles* suited to his view of the case.²

He here strikes the keynote of the whole matter, that is, that the search should be for the underlying and controlling *principles* applicable to such a state of facts. What usually embarrasses the master most is the great number of authorities cited by counsel in their zeal, many of which, upon a critical

¹ Day v. Brown, 18 Grant's Ch. R. 681.

² Ante, § 340.

examination, will be found to have no application to the case on hearing.

One of the most frequent mistakes, and the one most fully to be avoided, is attempting to apply a principle correctly reported right and proper in view of the facts found in a reported case where the principle is laid down, to a set of facts either wholly or essentially different. Often the only difference, or a difference in a single fact, renders the principle inapplicable. In studying the reported case the facts upon which the reasoning of the court is based must constantly be kept in view. Nothing is more true than the statement of Lord Mansfield, that "it is always unsatisfactory to abstract the reasoning of the court from the facts to which that reasoning is meant to apply. It has a tendency to misrepresent one case and mislead another."¹ If counsel would critically examine every case cited in their briefs, and only rely upon such as have a bearing or throw light upon the actual question at issue, judges would be relieved from a vast amount of useless labor, but this cannot be hoped for. The average brief is put together as with a pitchfork. A principle is found in a case or text-book, and a number of cases cited in its support are copied in the brief with all the cases cited, often without even a verification of book or page. A careful examination of such authorities shows that, because of the facts being different from those of the case at bar, many of them have no application whatever to the matter under consideration, others contain only, as *obiter dicta*, the bare statement of an abstract proposition of law, correct enough, perhaps, but of no possible assistance to the court, while it not unfrequently happens that others, upon a critical examination, are found to establish a principle exactly the opposite from that contended for by counsel. As said by Mr. Elliott, "It is not an infrequent occurrence for an advocate, who has not given the authorities relied upon by him a thoughtful study, to be humiliated by having them turned against him. The reports contain many instances where, even on appeal, cases have been cited which have furnished weapons to the enemy."²

¹ *Revell v. Hussey*, 2 Ball & Beatty, 280, 286. For a full discussion of the subjects see *Id.*, ch. 2; *Ram v. ...*

² 1 Elliott's General Practice, § 65. Judgment, chs. XII to XIX;

§ 360. **Master's conclusions or findings of law—Continued.**—In comparing the facts of the reported case with those of the case on hearing it may be well for the court or master to consider the following suggestions: *First.* There may be an absolute identity of facts. Where this occurs it follows, of course, that, if the principle applied in the first is correct, it must of necessity apply to the second. *Second.* A state of facts, though different, may yet be governed by a principle broad enough to include both. Therefore, first get, if possible, the exact facts of the case cited and compare them with the facts of the case at bar. This implies, of course, that you are in full possession of the facts of the case at bar. Owing to defective reporting, or a failure of the court to state them in the opinion, this is frequently hard to do; then see exactly what questions were raised in the court below, and, lastly, see what questions were reserved by objections, exceptions, motion for new trial, assignment of error or otherwise, for the decision of the upper court. This will enable you to judge what portion of the opinion is to be considered as authority, and what *obiter dicta*.

General principles are frequently announced in opinions which are in apparent or actual conflict with doctrine laid down in some particular case. Now the conclusion must not be jumped at, that the particular case is overruled or the doctrine therein stated modified. In stating a general rule it is not possible nor practicable for the writer to keep in mind, and if he can do so, to state the various limitations or exceptions to the general rule.¹ There is no statute, and from the very nature of the case there can be none, regulating the weight to be given to the decisions of the courts. It is one of the inherent powers vested in every judge to determine this question for himself. His discretion, however, is not an arbitrary one, but must be guided and controlled by certain rules and principles well defined but too frequently overlooked.

First Book of the Law, ch. XXIII, 551; *Buchner v. Chi. etc. R. Co.*, 60 Wis. 264, 19 N. W. 56; *Rohrbach v. Germania Ins. Co.*, 69 N. Y. 47, 58, 20 Am. R. 451. See *Mayer v. Erhardt*, 88 Ill. 452, 457; *Cohens v. Virginia*, 6 Wheat. 264.

¹ For full discussion of this subject see "Briefs and Brief Making," *post*, § 539 *et seq.*, and especially §§ 550,

§ 361. **Master's conclusions or findings of law — Continued.**—The value of an authority may be lessened or depreciated by the following considerations: The case may have been poorly considered; it may be the facts are not stated; the case may have been decided by a divided court; it may be a question and not one supported by an unbroken line of decisions. There may be other decisions of courts of equal respectability which hold the contrary; the court itself may be of such a character that its decisions will not be recognized as of any great authority, or lastly, the court may be one of inferior appellate jurisdiction.

Not only in the examination of cases cited by counsel should the court, or master, carefully ascertain the facts upon which the opinion is based, and the underlying principle applicable thereto, but the relative or controlling force of the opinion must be determined. The controlling force or value of a case itself may be of the very highest character, allowing legal discretion whatever, but, on the contrary, demand unconditional and absolute submission; or it may be so weak and of such little force as to have little, if any, influence on authority. Of the first class are decisions of the court of last resort with reference to the case on hearing; in other words, the court which must finally pass upon the questions if an appeal should be taken. For example, the supreme court, or court of appeals — or by whatever name it may be called — the court of last resort in the jurisdiction where the case is being heard, the supreme court of the state, or the supreme court of the United States, in all cases where an appeal lies to it from United States courts of inferior jurisdiction, and in all cases arising in state courts where federal questions are involved, justifying an appeal from such tribunals to the United States supreme court.

Of course, in stating that the decisions of such courts in such cases, are absolutely and unconditionally binding on authority, it is meant that the lower court has no legal discretion to disregard the same. Any court has the physical power to disregard opinions and decisions of every other tribunal in the land, past or present, and decide upon its own judgment. A justice of the peace may gravely arraign the supreme court of his own state for what he designates as erroneous holdings, and, as a Vermont lawyer said of a dec-

of Chancellor Doe of that state, "His coolness and utter disregard of law may be such as to command moral admiration," yet there is no remedy but by appeal. So long as his acts are in such apparent good faith as to prevent his impeachment he may continue not to dispense, but to dispense with both law and justice. So long as he has jurisdiction he will be permitted to blunder on in utter oblivion or disregard of precedent or authority, and his victim not have even a civil action for damages.¹

IV. DRAFT REPORT AND OBJECTIONS THERETO.

§ 362. The draft report and objections to same.—The master having formed his conclusions of fact and of law applicable thereto, and having determined what decree or order he should recommend to the court, he proceeds to embody them in his draft report, which draft report as to him is final, unless afterward altered or modified by him, either upon suggestion of counsel or upon his own motion. Under the English practice the master after the hearing prepared the *draught* of his report, and, at the request of either party, issued a "warrant that the parties, or some of them, do again attend him, who have liberty to peruse and take a copy of the report, and after that either party may again attend the master, and take out the warrant to *settle* the report, which the master would do, unless either party brought in *objections* in writing to the draught of the report, and took out a warrant to be heard thereupon; and then the master decided the *objections*, and settled his report, after which no evidence was admitted." After the report was settled, either party might take out a warrant to attend the *signing* of the report.² As stated above, the ancient practice was, upon completion of the draft report, for the master to notify counsel that they might appear in his office and inspect the same or take copies thereof, but, thanks to the modern typewriter for its facilities in furnishing duplicate copies, the old practice has been superseded—it being

¹ *Lund v. Hennessy*, 67 Ill. App. 288 ² *Maddock's Ch. Pr.* 680; *Har. and cases cited*; *Bishop, Non-Contract Law*, §§ 771, 781; *Cooley on Torts* (2d ed.), 472.

customary now for the master to serve copies of his draft report together with his notice.

The English practice required that a party should never except to a master's report unless he had first filed objection to the report before the master, and when there was no corresponding objection brought in it was allowed good cause to discharge the exception. This being the case, of course an unsuccessful party was entitled to notice that the report was in draft, that is the master, after writing out his report, before filing it in the clerk's office, notified counsel that it was in draft, thereby affording opportunity to point out proposed errors, and make objections to his conclusions, so as to give him an opportunity for considering such objections and correcting his report, if satisfied that any such objections were well taken.¹ In the majority of jurisdictions in this country this rule still obtains and is rigidly enforced.²

§ 363. Reasons for the rule.—The reasons for the rule requiring objections to be filed with the master are stated by Lord Chief Baron Gilbert as follows: "The ancient rule was that the party should never except but where he had first objected to the draft of the report before the master, and when there was no objection brought in, it was allowed as good cause to discharge the exception; and it were to be wished that this good rule was strictly followed, since if the party objected, he might have showed the master his error, and his report would have been altered in that particular, and not troubled the court. Whereas it often happens that the party will conceal some material objection, and keep it in *petto*³ to the master; and when this comes on by way of exception it makes a variance in the report; and so it might have done if it had been fairly disclosed and laid before the master;

¹ Hatch v. Indianapolis & Springfield R. Co., 9 Fed. Rep. 856.

² Troy, etc. v. Corning, 6 Blatchf. 326, Fed. Cas. 14,196; Gaines v. New Orleans, 1 Woods, 104, Fed. Cas. 5,177; M. E. Church v. Jaques, 8 Johns. Ch. 77; Gleaves v. Ferguson, 9 Tenn. Ch. 589; Gordon v. Lewis, 2 Sumn. 148, Fed. Cas. 5,618; Byington v. Wood, 1 Paige, 145; Copeland v. Crane, 9

Pick. 78; Hurd v. Goodrich, 5 Ill. 450, 456; Whitesides v. Pulliam, 11 Ill. 285; Pennell v. Lamar Ins. Co., 11 Ill. 303, 306; McClay v. North, 11 Ill. 370; Brookman v. Aulick, 11 Ill. 377; Prince v. Cutler, 69 Ill. 271; Cheltenham Imp. Co. v. Woodhead, 126 Ill. 279, 284, 21 N. E. 100.

³ His own breast.

hath the other party any previous notice upon what ground such an exception goes, or upon what foundation it stands. And it is but too often said, that particular matter was never stood upon, or insisted on before the master, and that it is a new matter which the party never heard of before. As this way of practicing too often surprises the party, so it generally ends in being sent back to the master to review his report, and hear the parties thereon; whereas if the old rule was kept up, viz, that neither party should except, but where they had objected before the master; and if this was allowed as a good cause (as certainly it ought to be) either by motion, or coming on of the exceptions to discharge them, it would very much tend to the ease of the court, and prevent abundance of trifling exceptions."¹ So, too, Chancellor Kent, by way of emphasizing the importance and necessity of filing objections with the master, says: "It would be oppressive, and render cases of reference a grievous burden, if a party might be permitted to lie by with an objection of that kind, until the accounts had been taken, after a tedious and expensive investigation. In this very case it was stated at the bar that there had been upwards of *fifty-seven* distinct hearings before the master. Few suitors would be willing to endure the repetition of such a reference, and they ought not to be compelled to submit to it, unless the necessity and justice of it be very apparent. The rule of practice is founded in much good sense, that no exceptions are to be taken to a report which were not made before the master had signed the report, for he might have allowed the objections, and have saved the parties unnecessary expense, as well as the court unnecessary trouble. This rule is not departed from except in special cases, such as that of *Pennington v. Muncaster*, 1 Maddock's Ch. R. 555, in which the general rule was emphatically admitted."²

It would seem that the case referred to by the chancellor permitted a relaxation of the rule without very good ground for it. In that case, after the report had been signed, returned into court and confirmed by an order *nisi*, on motion, exceptions were allowed to be taken, although no objections

¹ *Forum Romanum*, 107, 168: *Troy Iron & Nail Factory v. Corning*, 6 Blatch. 323, 333, Fed. Cas. 14,196. ² *Methodist Church v. Jaques*, 8 John. Ch. 78, 81.

had been filed with the master, on the ground that the solicitor "was not aware that it was necessary to object to the report in the draft." This indulgence was granted, too, in the face of the rule laid down in the Practical Register, cited by counsel, that "after a report is confirmed, the court will not easily, if at all, stir it upon pretence of an omission or mistake; for the parties had sufficient time to except to it, and if they will not mind their business, it is their own fault."¹ And again it is said that the whole benefit of the reference to a master in the first instance will be lost unless the parties are compelled to appear and litigate the matter before him. It is undoubtedly the duty of the master, although the proceedings are *ex parte*, to examine the subject with as much care as if both parties appeared and contested the matter before him. But every person at all conversant with the proceedings of courts of justice is aware that the arguments of counsel materially assist the minds of those who are intrusted with the decision of any matter in coming to a correct conclusion, both as to the law and the facts of the case. Hence it is that a court of *dernier resort* will not hear and decide any point which has not been distinctly submitted to the court below. And, for the same reason, the chancellor will not permit any exceptions to be taken to a master's report which are not founded on objections distinctly made and urged upon the consideration of the master.²

Of the necessity and importance of enforcing strictly the rule that a party desiring to question the correctness of a master's findings of fact by the court, that he must file objections with the master, Vice-Chancellor Wigram says: "The objections are in the nature of pleading. They inform the master of the point in respect of which his draft report is objected to, and they insure the same question only being brought before the court when the report is reviewed. Without this safeguard there would be constant confusion and uncertainty."³

§ 364. Reasons for the rule—Continued.—Against these unqualified encomiums upon the utility or benefit derived from

¹ Wyatt's Prac. Reg., p. 380.

Jaques, 8 John. Ch. 78; Beames'

² Byington v. Wood, 1 Paige, Ch. Orders, 258; Huse v. Lawes, Bunb. 145, citing Remsen v. Remsen, 2 R. 98.

John. Ch. 495; Methodist Church v. ³ Ottey v. Pensam, 1 Hare, 322.

requiring objections to be filed with the master, as a basis of exceptions afterwards to be taken in court, may be opposed the equally pronounced opinions of distinguished judges, disapproving such a course as an unnecessary and useless practice. For example, Judge Gresham, of the seventh circuit, said that he could see no good reason for observing the formalities of the old practice, and, that if he should sustain the motion to recommit to the master, counsel would probably go before the master, and, in support of objections to the draft, again repeat arguments already urged in the first instance;¹ and upon a similar motion, the late Mr. Justice Davis, of the same circuit, said, in his large way, "that it was waste of time and labor to have two sets of exceptions;" while Mr. Justice Wallace, of the second circuit, said that when the correctness of the principal finding of the master—a finding upon the ultimate question of fact referred to him—is controverted, it is hardly to be supposed that an objection to his draft report will induce him to change his conclusion, and consequently the reason for the rule does not fully obtain.²

§ 365. **Practice in the federal courts.**—The practice requiring objections to be first filed with the master, as a foundation for exceptions to be afterwards filed with the clerk, is anything but uniform in the courts of this country. In some courts the rule is strictly adhered to, while in others, either by rule of court or a statutory provision, the necessity for filing such objections is expressly abrogated, while in others still, where there is no rule or statute relating to the matter, the looser practice obtains of allowing a party to first express his dissatisfaction by filing exceptions upon the return of the master's report into court. The practice is anything but uniform in the various circuit courts of the United States, where we would certainly expect to find uniformity in this regard. The practice in the various circuits may be classified as follows:

First. Circuits in which the English rule is strictly adhered to and no exceptions allowed to the master's findings not based on previous objections filed with him.

Second. Circuits in which the above rule is not strictly enforced, but simply followed as the preferable course,—permit-

¹ *Hatch v. Indianapolis & Spring-*
field R. Co., 9 Fed. 856, 858-59.

² *Celluloid Mfg. Co. v. Cellonite*
Mfg. Co., 40 Fed. 476.

ting exceptions to be taken to the master's findings, upon filing his report, not based on previous objections, where counsel prefer so to do.

Third. Circuits in which the practice is not to submit any draft report to counsel, but to file the report at once, upon its completion, and allow the parties then to file their exceptions.

In 1897 I addressed a letter of inquiry to the masters in chancery in the various United States circuit courts requesting information as to the practice in this regard in their circuits. Most of these were promptly answered and the information desired furnished. Comparing the information thus obtained with the decisions of the courts in the various circuits where the question has arisen the following result is obtained:

§ 366. *Practice in the first circuit.*—As to the practice in the first judicial circuit it is probable that the English rule of requiring objections to be filed with the master, as a basis for exceptions to be taken on the coming in of the report, is strictly adhered to. Mr. Freemont E. Shurtleff, clerk of the United States circuit court of the district of New Hampshire, says that the practice, so far as he knows, is to file objections with the master to the draft of his report. He adds that he does not know what the general practice is in the other districts of the first circuit, but suggests that the judges would naturally follow the practice in the district of Massachusetts, as the larger amount of federal court business is done there.

Justice Clifford, sitting in the United States circuit court, Massachusetts district, although this precise question was not before the court, in setting out the course of practice in cases of reference to the master, says:

"The usual course is that the master allows both parties, if they desire, to introduce testimony upon the subject of damages. He hears them fully, and when he has taken all the testimony, heard the parties, and come to a conclusion, he makes a draft of the report in the premises and shows it to the parties, or files it in the clerk's office, and gives time for the parties, respectively, if they see fit, to make their objections to the drafted report. When those objections are made, it becomes his duty to consider or reconsider, as the case may be, the questions involved in those objections; and if, upon full consideration, he is still of the opinion that he was right in the conclu-

sions formed and stated in the drafted report, he then makes his final report, founded on the previous objections made to the draft report, and then the whole matter comes back to the circuit court for adjudication upon the master's report. Either party may set down the case for hearing upon the exceptions to the master's report. Both parties may except; both may object in the first instance to the draft report, and both parties may afterward except to the final report. They are entitled to be heard upon all the questions which have arisen before the master, provided they are embraced in their objections and in their exceptions."¹

This decision was in 1868, long after the promulgation of United States Equity Rule 83, and recognizes the English practice as not modified by said rule. In a later case in the same district the court again recognized the correctness of the above rule, remarking that the object of delivering a draft report to counsel is "solely to give them opportunity to suggest errors, to ask revision and reconsideration, to take exceptions, and to do whatever may be necessary to put them in position to contest the approval and confirmation of the report as finally made."²

§ 367. Practice in the second circuit.—The decisions in this circuit are not harmonious; but upon this question the later ones, however, are in favor of the strict enforcement of the rule requiring objections to be filed with the master. In 1883 a case arose in the southern district of New York where objections were not filed with the master, in which the court, instead of re-referring the cause to the master, with leave to file objections, allowed counsel to file objections with the master *nunc pro tunc*. In this case it appeared from the certificate of the master that the respective counsel were notified that the draft reports were ready for their inspection and suggestions, whereupon they appeared before him; that the plaintiff's counsel verbally objected to certain findings, and that the written exceptions which had been filed were substantially the same as the verbal objections which were presented to him when the draft reports were submitted. The plaintiff's

¹ Union Sugar Refinery Co. v. Mathieson (Cir. Ct. Mass. 1868), 3 Cliff. 146, Fed. Cas. 14,898.

² American Bell Telephone Co. v. Western Union Tel. Co. (C. C. App. Mass. D. 1895), 69 Fed. 666, 670.

practice was faulty in that the verbal objections were not reduced to writing and were not filed with the master. The court said: "It will be sufficient if they are now reduced to writing in substantially the form in which they appear in the exceptions, and are filed with the master *nunc pro tunc*."¹

In a case in the circuit court in the same district, the master made out and submitted a draft of his report to counsel of the respective parties, and counsel for defendant deferred his objections, and made no further question to the master, and for this reason counsel for the plaintiff insisted that the defendant thereby waived all ground of exception to the report. The court, however, upon this point held that the "exception was to a principal finding, upon all the evidence in the case, about which nothing could be done before the master except to request him to change his finding. The defendants were under no obligation to make that request after he had announced his conclusion upon that point, but could raise the question before the court as to whether the finding was warranted by the proofs by filing exceptions in court according to the rules of the court."²

In another case Mr. Justice Shipman, commenting on the necessity of filing objections, quotes Lord Chief Baron Gilbert's reasoning in favor of the English rule and its strict enforcement, and, after citing and quoting from *Story v. Livingston*,³ then adds: "We think, therefore, that, as to any questions arising upon objections made during the hearing, and reserved by the master, they should have been embraced in the objections filed with him to his draft report."⁴

And in a still later case, the same court is still more emphatic in its indorsement of the strict rule. The court say:

"According to the correct practice, no exceptions to the report can be considered which were not taken before the master in the form of objections to his draft of the report. The reason for this rule of practice is that the master might have allowed the objections, and corrected his report, if errors had been pointed out to him; thus saving the parties unnecessary trouble.

¹ *Fischer v. Hayes*, 16 Fed. 469.

² *Jennings v. Dolan* (Cir. Ct. S. D. N. Y. 1887), 29 Fed. 861.

³ 13 Pet. 359, 366.

⁴ *Troy Iron and Nail Factory v. Corning* (U. S. Cir. Ct. N. D. N. Y. 1869), 6 Blatchf. 323, 333, Fed. Cas. 14,196.

2 Daniell, Ch. Pr. (2d Am. ed.) 1483; Church v. Jaques, 3 Johns. Ch. 81; Byington v. Wood, 1 Paige, 145; Copeland v. Crane, 9 Pick. 73; Story v. Livingston, 13 Pet. 359; Gaines v. New Orleans, 1 Woods, 104, Fed. Cas. 5,177; Gordon v. Lewis, 2 Sumn. 143, Fed. Cas. 5,613; Nail Factory v. Corning, 6 Blatchf. 328, Fed. Cas. 14,196. So far as the cases of Hatch v. Railroad Co., 11 Bissell, 138, 9 Fed. Rep. 856, and Jennings v. Dolan, 29 Fed. Rep. 861, relax this rule of practice, they are inconsistent with the practice in this circuit, as recognized in the case of Nail Factory v. Corning. When the correctness of the principal finding of the master—a finding upon the ultimate question of fact referred to by him—is controverted, it is hardly to be supposed that an objection to the draft report would have induced him to change his conclusion, and consequently the reason for the rule does not fully obtain; but it is no hardship to the dissatisfied party to require him to state his objections, and, unless the precedents are to be disregarded, he must be deemed to waive any objection which he does not state.”¹

§ 368. Practice in the third circuit.— So far as I know the question has never been judicially passed upon in this circuit, at least I have not been able to find any reported case where the question was raised, but from Mr. Henry B. Robb, deputy clerk of the United States circuit court at Philadelphia, I learn that the English practice is universally followed in that circuit. He states the practice to be as follows:

“1. It is the custom in this circuit for the master to notify counsel that his report is ready, and they thereupon, after inspection, file their objections in the first instance with him.

“2. Having filed their objections they argue them before the master, if he desires argument, which is usually the case, or he considers the objections without argument, and then files his report, with the objections and such disposition as he has made of them, in court.

“3. The matter then comes before the court upon the master’s report and exceptions thereto, and is finally disposed of.”

The foregoing is in accord with the suggestion of the court, in a recent case in that circuit, the only time I find the sub

¹Celluloid Mfg. Co. v. Cellonite Mfg. Co. (Cir. Ct. S. D. N. Y. 1889), 40 Fed. 476.

ject mentioned, as follows: "Upon the coming in of the report the parties can file their exceptions founded upon previous objections, and have the court pass on their validity."¹

§ 369. **Practice in the fourth circuit.**— In this circuit the decisions of the courts are conflicting and the practice is not uniform in different portions of the circuit. In 1889 the question was raised in the circuit court, western district of Virginia, and the construction then placed upon Equity Rule 83 was that it obviated the necessity of filing objections with the master. In that case Judge Paul, in writing the opinion, speaking of the former practice in the federal courts of refusing to hear any exceptions to the master's report except those based on objections filed with the master, says:

"This was formerly the English practice. The master made a draft of his report, notified counsel of his findings, gave them an opportunity to point out errors, and the master considered and corrected them. It was also the practice of the federal courts prior to the adoption of the equity rules of practice. This was the practice when *Story v. Livingston*, 13 Pet. 359, was decided. This case has been strenuously urged upon the attention of the court as applicable to the exceptions under consideration. The rules of equity practice were promulgated by the supreme court on March 2, 1842, and since that time the practice has been different from that indicated in *Story v. Livingston*. So far from its now being required that exceptions shall be filed before the master during the time he is making up his report, one month is allowed, after the report has been completed and returned to the clerk's office, in which to file exceptions thereto. Rule 83 of rules of practice in equity provides:

"The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in his order book. The parties shall have one month from the time of filing the report to file exceptions thereto; and, if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule-day after the month is expired."

"This provision leaves no question as to the correctness of the

¹ *Hoe v. Scott* (Cir. Ct. Dist. New Jersey), 87 Fed. 220.

practice pursued in this case. This view is sustained in the opinion of Judge Gresham in *Hatch v. Railroad Co.*, 15 Myer, Fed. Dec. 839, 11 Bissell, 138, 9 Fed. R. 856-860."¹

In a more recent case in the circuit court of appeals in the same circuit, just the opposite was held, viz., that Equity Rule 83 does not modify the English chancery practice, and that one who desires to contest the findings of fact made by a master must base his exceptions upon objections previously filed in the master's office. Chief Justice Fuller, upon a motion for rehearing, sat with Judges Simonton and Goff, therefore additional weight is given to the decision. Indeed, it may be considered the most important authority upon the point outside of the supreme court of the United States. Upon a motion for rehearing, Judge Simonton, after stating the question, says:

"A master is appointed by the court to assist it in various proceedings incidental to the progress of a cause before it, and he is usually employed to take and state accounts, to take and report testimony, to perform such duties as require computation of interest, the value of annuities, the amount of damages in particular cases, and similar services.² In other words, he finds all the facts bearing upon the matters referred to him, and reports them to the court, to aid it in coming to its conclusions upon the case made. To make this aid effectual, all the matters referred should be reported on. If, in the progress of the references, the parties neglect or omit to bring before the master all the facts bearing upon the matters referred, and necessary to a correct conclusion by the court, they are in default. And by this default the court is deprived of aid sought in ordering the reference. If the master omits or neglects to report all the facts produced before him bearing upon the matters referred, he is in default. The parties are put to a disadvantage, and the report should be re-committed, unless the parties supply the omission by stipulation. It is true that in some of the circuit courts a loose practice has grown up, and exceptions to a master's report are entertained, dealing with facts to which his attention was never called. This practice does not commend itself. It fre-

¹ *Fidelity Ins. & Safe-Deposit Co. v. Shenandoah Iron Co.* (Cir. Ct. W. Va., 1889), 42 Fed. 872. ² *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 855.

quently operates a surprise, and it shuts the door to any explanation. It gives room for the display of skill and strategy on the part of ingenious counsel. It may secure success at the expense of right. When there exists a rule of practice, inculcated and approved by recognized authorities, it should be followed. To prevent misapprehension, it is best to state that we do not require the conclusions of the master on matters of law to be first excepted to before him. This is unnecessary.¹ But we do require that matters of fact upon which exceptions to his report are made be brought to his attention, in order that he might report them."²

In the same case the court further say:

"The gravamen of the objection to the opinion of the court is the suggestion made as to the practice of confining the exceptions to a master's report to the exceptions taken before him. This suggestion is made on the authority of the decisions of the supreme court and of justices of that court on circuit. The rule is prescribed in 2 Daniell, Ch. Prac. 1314, and the decisions quoted — *McMicken v. Perrin*, 18 How. 507; *Gaines v. New Orleans*, 1 Woods, 104, Fed. Cas. No. 5,177; to which may be added *Cowdrey v. Railroad Co.*, 1 Woods, 331, Fed. Cas. No. 3,293; *Topliff v. Topliff*, 145 U. S., at page 173, 12 Sup. Ct. 825,—all made after the adoption of Rule 83, which it is insisted changed the rule in Daniell."³

Yet, notwithstanding this emphatic approval of the English rule, a master in chancery, writing from Baltimore, Md., as to the practice in the fourth circuit, says: "It has never been customary to file objections with the master to the draft of his report; but the usual custom is, or at least my practice is, to send my report to the court and then counsel file their exceptions."

§ 370. Practice in the fifth circuit.—The general practice in this circuit seems to be that, when the master has prepared his report, he is to file the same at once in the office of the clerk, without submitting a draft to counsel, or giving an opportunity for any party dissatisfied therewith to file objections with the master, though, so far as I know, in every reported case

¹ 2 Daniell, Ch. Prac. 1314.

² *Gay Mfg. Co. v. Camp*, 15 C. C. A. 226, 68 Fed. 67.

³ 68 Fed. 67. For original case, see 65 Fed. 794.

the courts have upheld the strict English rule of requiring objections to be filed with the master, as a basis for future exceptions. In 1871 the question came before the circuit court at New Orleans, at which time Mr. Justice Bradley, speaking for the court, said:

"The rule of practice is that no exceptions will be heard by the court which have not been made before the master, so as to give him an opportunity of considering the same and correcting his report. But as counsel on both sides have evidently acted under a misapprehension of the rule, I will not overrule the exceptions on that ground, especially as some of them are of great importance to the rights of the parties. But it is desirable that the rule should be observed, and hereafter, in the absence of very special circumstances, the court will feel bound to enforce it. It was declared by the supreme court of the United States, in *McMicken v. Perrin*, 18 How. (U. S.) 159 (1855), 507."¹

Again, in 1891 the question came before the circuit court in the northern district of Florida, in which the court said: "The strict rule in regard to exceptions to a master's report is that only such exceptions will be heard by the court as have been made before the master;"² and again, Mr. Justice Newman, speaking for the court in a case in the circuit court for the northern district of Georgia (1895), says:

"The practice in this district, following what is believed to be the correct chancery practice, is for the master in chancery to prepare a draft of his report, and notify counsel of the same, to which they must except before him, prior to the filing of the report regularly by the master in the clerk's office, in order to have their exceptions considered by the court after the same has been filed."³

Yet, notwithstanding this emphatic indorsement of the strict rule of chancery practice, the majority of the masters in chan-

¹ *Gaines v. New Orleans* (Cir. Ct. E. D. La.), 1 Woods, 104, Fed. Cas. No. 5,177. Fed. Cas. 3,293; *Story v. Livingston*, 13 Pet. 359; *Medsker v. Bonebrake*, 108 U. S. 66, 2 Sup. Ct. Rep. 351;

² *Cutting v. Florida Ry. & Nav. Co.* (U. S. Cir. Ct. N. Dist. Fla.), 48 Fed. 508, citing *Gaines v. New Orleans*, 1 Woods, 104, Fed. Cas. 5,177; *Burns v. Rosenstein*, 135 U. S. 449, 10 Sup. Ct. Rep. 817.

Cowdrey v. Railroad Co., id. 331, ³ *Central Trust Co. v. Richmond & D. R. Co.*, 69 Fed. 761.

cery in this circuit do not recognize this course in practice, but, as soon as their reports are prepared, file them with the clerk, without any notice to counsel or service of a draft thereof. There are, however, a few exceptions. For example, Mr. Benjamin H. Hill, master in chancery of the United States circuit court, fifth circuit, writing from Atlanta, Georgia, says of the practice in the northern district of Georgia that the "usual practice of attorneys is to file objections with the master to the draft of his report, and, if they are not filed, the court declines to hear exceptions to the findings on the return of the report into court." He adds: "I do not know what is the practice in the circuit generally, but the English chancery practice has been adopted by the court and the master in the United States circuit court for the northern district of Georgia."

In other parts of the circuit the strict rule is not followed, but a compromise course is pursued. For example, Mr. A. G. Brice, master in chancery of the United States circuit court at New Orleans, Louisiana, writing of the practice in his district, says: *First*. "The late Judge E. C. Billings deemed it advisable that Equity Rule 83 should govern the practitioners. Later this rule was modified by him, with the approval of the United States circuit judge; but in such cases the attorneys were obliged to obtain the consent of the court before they could file objections. Therefore will say that it is not the universal but the usual practice of attorneys in this jurisdiction to file objections with the master. This rule is based upon the theory that the master, after considering the exceptions, may, if it appears to him advisable, reopen the case, either to hear further evidence, or to modify his conclusions of law or fact, or both. *Second*. If no objections are filed before the master, the consent of the court must be obtained to file exceptions after the master files his report. The permission to file is considered as an order that the court will hear the objections. *Third*. The general practice is to file exceptions before the master for his consideration; filing them in the court after the report is filed is an exception to the rule."

§ 371. Practice in the fifth circuit — Continued.— In other parts of the circuit the English rule is wholly ignored, the masters filing their reports as soon as prepared. For example,

of the practice at Savannah, Georgia, Mr. George W. Owens, master in chancery of the United States circuit court of that place, says that it is not the custom for attorneys to file objections with the master to the draft of his report, and that, during ten years' experience as master, he had but one such application; that he declined to serve a draft report or permit objections to be filed, and that the attorney did not except to his ruling. Mr. Eustace W. Speer, master in chancery of the United States circuit court, writing from Athens, Ga., of the practice in the southern district of that state, says that the *modus procedendi* is as follows:

The master in chancery prepares his report on the law and the facts of the suit without any suggestion or interference on the part of the lawyers interested. "When the report is completed and filed he gives the attorneys employed notice of the fact. If, on examination, they are dissatisfied with his findings, they file their objections, and in due time the case reaches and is adjudicated by the chancellor;" while from another part of the circuit comes a similar emphatic statement.

Of the practice in the northern district of Mississippi, Mr. G. R. Hill, master in chancery of the United States circuit court, says that it is not usual to file objections with the master to the draft of his report, and that it is not the practice of the court to decline to hear exceptions to findings on the ground that no objections were filed with the master. He adds that he only remembers one case in which objections were filed with the master. From another part of the same circuit we learn that the same course has obtained hitherto, with indication that the "loose practice" is to be abandoned in favor of the strict rule in the future.

Mr. Charles S. Adams, master in chancery of the United States circuit court, writing from Jacksonville, Fla., of the practice in his district, says:

"We have hitherto not adopted the English chancery practice of submitting a draft of the proposed report by the master to the counsel interested, but personally I think the practice a better one in order to save labor on the part of the court, and very frequently exceptions to the report when filed, and Judge Locke states that he is also in favor of this practice. Hereafter, in important litigations in which I am interested

as master, I propose to submit a draft of the report to counsel in accordance with the English practice."

§ 372. Practice in the sixth circuit.—Doubtless the question has often arisen in practice in this circuit, but I have not been able to find it passed upon in any reported case. In 1898, in a case in the district of Michigan, Judge Severens squarely held that the English practice is not modified or affected by Equity Rule 83, and that, consequently, a party desiring to contest the findings of fact made by a master must, as a basis for exceptions, file objections with the master and have the same passed upon by him. The judge held that he would not consider exceptions to a master's report which were not founded on written objections made to the draft of the report while it was still in the master's hands. As a large amount was involved in the case he said that he did not feel that it would be just to allow the case to go off in that way, and he therefore re-referred it to the master at the defendant's expense, to allow the record to be put in proper shape. In the argument of the question counsel cited the principal cases in both state and federal courts, among others, those cited in the foot-note.¹ The language of the court in another case in this circuit, while the question was not really before the court, shows that the English practice of requiring objections to be filed with the master is considered a proper one. Judge Lurton, speaking for the court, says:

"Exceptions to a master's report must point out specifically the errors upon which the party relies. The object of such definiteness is to give the master an opportunity to see where-

¹ Mott v. Harrington, 15 Vt. 185; 226, 68 Fed. 67; Farrar v. Bernheim, Brown v. McKay, 51 Ill. App. 295; 21 C. C. A. 264, 75 Fed. 136; In the Huling v. Farwell, 33 Ill. App. 238; Matter of Hemiup, 3 Paige Ch. 305; Harding v. Handy, 11 Wheat. 103; Hatch v. Indianapolis & Springfield Story v. Livingston, 13 Pet. 359; Troy R. Co., 11 Biss. 138, 9 Fed. 856; Sheffield Iron & Nail Co. v. Corning, 6 Blatchf. 328, Fed. Cas. 14,196; Emerson v. Atwater, 12 Mich. 314; McMannomy v. Walker, 63 Ill. App. 259; Friedman v. Schoengen, 59 Ill. App. 376; Springer v. Kroeschell, 59 Ill. App. 434; Hodson v. Glass Co., 54 Ill. App. 248; 285, 14 Sup. Ct. R. 343. The case referred to in the text is Gibbons, Receiver, v. Anderson, et al., decided at Grand Rapids, Mich., January, 1898, and reported to me by Messrs. Fletcher & Wanty, attorneys of that place.

in his report is subject to objections, and to apprise the opposite party of just what he has to meet.”¹

§ 373. Practice in the seventh circuit.— So far as I know, there is only one case reported in which this question was raised, and passed upon by the court in this circuit. In 1882 a case arose in the district of Indiana in which it was urged by complainants’ counsel that, after writing out his report, and before filing it in the clerk’s office, the master should have notified counsel that it was in draft, thereby affording them opportunity to point out supposed errors, and make objections to his conclusions, so as to give him an opportunity of considering and correcting his report, and that no exceptions, according to correct chancery practice, can be heard by the court which have not been carried in before the master; and it was further contended by counsel that the equity rules governing practice in the federal courts do not cover all the details of equity practice, and that this is evident from Rule 90, which adopts the English practice in omitted cases, as it was known and understood when the equity rules were adopted. The court, through Judge Gresham, who wrote the opinion, in passing upon these contentions of counsel, says:

“It is not the practice in this district, nor, as I understand, in this circuit, for the master, after hearing full argument, to prepare a draft of his report and then notify the parties and summon them to make objections. When the case has been fully argued in the first instance, the legal right of the unsuccessful party to go before the master, make objections to the draft of the report, and argue those objections, is not recognized in practice.”

“The equity rules provide for conducting references before masters in a simple and expeditious manner. It is fair to assume that in adopting these rules the supreme court meant to dispense with the formalities incident to settling the master’s report.”

Here the judge quotes Rule 77, and continues:

“Nothing is said here, or in any of the other rules relating to practice before masters, about notice to parties that the report is in draft, and to appear before the master and settle it.

¹ Columbus, S. & H. R. Co. Appeals, 48 C. C. A. 275, 109 Fed. 177, 219.

As soon as the report is ready,' 'the master shall return it into the clerk's office,' and 'the parties shall have one month from the filing of the report to file exceptions thereto.'¹ The report is ready, within the meaning of Rule 83, when it is written."

"It is not necessary to refer to the practice of the high court of chancery in England, as it existed in 1842, for the formalities attending the settlement or making of master's reports, and the entering of exceptions thereto. These matters are provided for in the equity rules."²

In another case in the same court the practice of filing the report in the clerk's office without requiring counsel to file objections with the master "was assailed with much vigor by Mr. Abbott of the Wisconsin bar, but it was approved by the court. Judge Davis said in his large way that it was waste of time and labor to have two sets of exceptions." Mr. W. P. Fishback, late master in chancery of the United States circuit court at Indianapolis, writes me that, in accordance with these decisions, "the invariable practice in this district is, and has been for more than twenty years, for the master to file his report with the clerk, as soon as it is completed, without preparing a draft for counsel to object to, in the master's office."

§ 374. Practice in the seventh circuit — Continued.— In Illinois the practice in the United States circuit court is not uniform. Major Bluford Wilson, master in chancery at Springfield, writes me that it is not the usual practice to file objections with the master; that the master hears argument of counsel, then formulates his report, and files it at once in court; while in Chicago objections are filed with the master, as a basis of exceptions to be afterwards taken. Mr. E. B. Sherman, master in chancery of the United States circuit court at Chicago, furnishes the following clear and lucid statement relative to the practice in his court:

"Until recently the opening words of Equity Rule 83: 'The master, as soon as his report is ready, shall return the same into the clerk's office,' were construed by the courts and masters in the seventh judicial circuit to mean that masters in

¹ Quoting from Rule 83.

² Hatch v. Indianapolis & Springfield R. Co., 11 Biss. 188, 9 Fed. 856.

chancery of the United States circuit courts were not required to furnish counsel with a draft of a master's report, or that objections need be filed before the master. (See *Hatch v. Ind. & S. R. R. Co.*, 11 Biss. 138, 9 Fed. 856.) I entertained some doubt of the correctness of this practice on account of its variation from the general practice of equity courts, and when the case of *Sheffield, etc. Ry. Co. v. Gordon*, 151 U. S. 285, 14 Sup. Ct. R. 343, was reported, my doubts increased. In 1894, when I read the decision in *Gay Mfg. Co. v. Camp*, 15 C. C. A. 226, 68 Fed. 67, in which Mr. Chief Justice Fuller sat in the circuit court of appeal I became satisfied that the rule should be construed as if it read: 'The master, as soon as his report is ready' (he having first furnished counsel with a draft thereof and having given opportunity for filing objections thereto), 'shall return the same into the clerk's office' (with the objections thereto, if any have been filed before him). From that time I have followed this practice, and so far as I know other masters in the circuit have done the same.

- "I am not advised as to whether the courts in Wisconsin and Indiana will or will not hear exceptions to master's reports, when no objections were filed before the master, but in this district the courts hold that exceptions as to findings of fact will not be considered unless objections thereto were filed before the master. As to exceptions to findings of law, it is held that they will be considered if no objections thereto were filed before the master."

In the eastern district of Wisconsin the "looser practice" prevails. Mr. John F. Harper, master in chancery of the United States circuit court, writing from Milwaukee, says that it is neither the universal nor the usual practice of attorneys in his district to file objections with the master to his draft report; and that the court will hear exceptions without the necessity of previous objections. He adds that so far as his own experience goes and so far as he had been able to ascertain by consulting leading practitioners, the practice is entirely covered by Equity Rule 83.

§ 375. **Practice in the eighth circuit.**—In the eighth circuit the lack of uniformity in this regard is, if anything, greater than in the fourth, fifth and seventh circuits. In some parts of the circuit the English rule of requiring objections to be filed

with the master, and of allowing no exceptions to be afterwards taken, except upon such objections previously filed, is rigidly adhered to, while in other parts of this circuit, masters never submit draft reports to counsel, and exceptions are taken for the first time after the coming in of the report, while, in still other parts of this circuit, a compromise course of practice is followed, viz: in important cases, or upon request of counsel, draft reports are submitted, with the privilege of filing objections to the same, and hearing argument thereon, the court, however, allowing other and different exceptions to be taken on the coming in of the master's report; while, in other cases, counsel are permitted to inspect the report in draft, make suggestions as to alterations, but are not allowed to file any objections. Surely the great diversity of practice in this circuit, as well as in the others named, emphasizes the importance of settling the question by an amendment of Equity Rule 83, either doing away with such objections in every case, and allowing exceptions to be taken for the first time after the coming in of the report, or by requiring masters and counsel to follow the English practice — the latter certainly being most commendable.

I have not been able to find any reported case in this circuit where the question has been raised and passed upon by the court, neither do I learn, in response to my queries, of any such case, but, from information derived from various sources, the following statement of the practice at different points in the circuit is given:

Mr. Justice Shiras, of the northern district of Iowa, in that circuit, writes me that he has always held that Equity Rule 83 was intended to settle the practice in regard to exceptions to a master's report. When the report is filed in the clerk's office, the parties are charged with the duty of examining the same, and determining whether exceptions thereto are to be taken. If none are taken after the report is thus filed, the assumption is that the parties are satisfied with the report. If the master submits a draft thereof to counsel, it is for the purpose of inviting suggestions or requests with respect to additional findings or of modifications and explanations of those made, in case they are not deemed sufficiently clear and specific. He adds that he cannot say that there is a settled practice on the

part of the masters in submitting a draft of the proposed report to counsel before filing the same with the clerk. In some instances it is done, but not uniformly, and I have never adopted a rule on the subject.

From information furnished by Howard S. Abbott and B. J. Shipman, masters in chancery of the circuit court at Minneapolis, we learn that it is not the practice in that part of the circuit to follow the English rule. The former writes that it is not the usual or customary practice to submit a draft report to solicitors in the eighth circuit, but the master makes his report and files it with the clerk at once, and exceptions are then filed in the office of the clerk under Equity Rule 83.

Mr. Shipman, author of *Shipman's Chancery Practice*, also informs me that it is not the usual practice to file objections with the master, and that it is not a common thing that he should serve a draft report. He adds that he has, "in cases where the report covered complicated questions, served a draft report and called for objections, but that the usual practice is for the master to file his report directly, and for objections to be taken by filing the same in writing with the clerk, which are then taken up for hearing the same as renewed objections would be under the strict English practice." He says that, so far as he can learn, in that district the court has never declined to hear exceptions to the master's report, on the ground that objections are not previously filed with the master.

§ 376. Practice in the eighth circuit — Continued.— Mr. William C. Howell, master in chancery of the circuit court at Keokuk, in the southern district of Iowa, says that it is not the practice in his district for counsel to file objections to the draft report, and that, where it is done, the court has not limited parties on the hearing to objections which were filed with the master. Mr. Edward H. Stiles, master in chancery of the United States circuit court at Kansas City, speaking of the practice in his district, says that "the practice is for the master to send a draft report to counsel requesting them to file with him, within a time specified, such objections thereto as they may desire. An opportunity is also given them, if desired, to argue the exceptions before the master with the view of inducing him to modify his report." He further adds that "under its application the court would probably decline to hear

exceptions to the findings filed after the return of the report," and that, should the master "file his report without first giving counsel an opportunity to file objections with him, the court would send the report back to the master with directions that he give counsel such an opportunity." He adds, "this is the general practice in at least this the western division of the district."

From Hannibal, Mr. F. L. Schofield, master in chancery of the United States circuit court, speaking of the practice in the eastern district of Missouri, in the same circuit, says that it is his universal practice, before filing his report, to "serve upon the solicitors a draft of same, with notice of time and place for hearing objections. Having passed upon the objections I attach the same to the report, with an added note as to my ruling on the same, then filed. So far as I am advised this is the practice of both divisions of this district. . . . My course has been pursued in obedience to what I considered the best practice in analogy to the old English practice, rather than in conformity to any known or fixed rule."

From St. Louis, Mr. Robert A. Bakewell, master in chancery of the United States circuit court, in reply to my questions says: "I do not know what the other masters would say. My own practice, and I believe the general practice here, is this: Before the report is filed the master notifies counsel. If they choose they look at the report before filing, and if they find any obvious error, or oversight, they call his attention to it, but no exceptions are filed before him nor any argument heard before him after the report is prepared." He adds that the court hears exceptions although no objections were filed with the master.

In reply to my questions the clerk of the United States circuit court at Fort Smith, in Arkansas, in the same circuit, writes me that "while it is not absolutely necessary that objections be filed with the master, the court prefers that such should be done;" he further adds that "the failure to file objections with the master does not preclude the filing and hearing of them after the master makes his report." He further says that upon consultation with Judge Rogers in regard to the matter, the latter informed him that he intended "to encourage the practice of filing objections with the master

in order that they may come in with the report and all be considered at once."

Of the practice at Denver, Mr. S. C. Hensdale, master in chancery of the United States circuit court, speaking of the practice in the district of Colorado, says: "Objections to his report are never filed with the master," but that the uniform practice in that district is for attorneys to file with the clerk in court any exceptions they see fit to the report of the master previously filed.

From the master in chancery of the circuit court of the United States, Mr. Samuel S. Cortis, at Omaha, Nebraska, we learn that the practice in that district is not to file objections to the draft report as a basis for exceptions to be afterwards taken, and that it has never been the practice in that district to furnish counsel with a draft report. He adds: "I think the first seventeen words of Rule 83 do away with the general provision of Rule 90, and that the above is the proper practice under the Equity Rules."

§ 377. **Practice in the ninth circuit.**—So far as I know, there are no reported cases bearing upon the question in this circuit, but, from information furnished me, it seems that the construction given to Rule 83 is that it does away with the necessity of filing of objections with the master. Mr. J. J. Edwards, clerk of the United States circuit court, writing from Carson City, Nevada, in this circuit, informs me that it is not the practice in his district to file objections with the master, but that exceptions are filed in the clerk's office after the coming in of the report; and Mr. E. H. Heacock, master in chancery of the United States circuit court for the northern district of California, writing from San Francisco of the practice in his district, says that in important cases it has been his custom, at the request of the attorneys, to follow the English chancery practice, and that, when not so requested, it is his usual practice, as soon as his report is ready, to return the same into the clerk's office. He adds that his construction of Rule 83 is that it is broad enough to permit filing of exceptions without previous objections having been filed in the master's office.

§ 378. **Practice in the state courts.**—There is anything but uniformity in the different states in regard to the necessity of filing objections with the master as a basis for excep-

tions afterwards to be taken. In some of them, by rule of court or by statute, the practice is abolished, while in others it is modified, while in others the strict English rule is rigidly adhered to.

Alabama.—In this state it is provided by Chancery Rule No. 93 that: "No notice to the parties to bring in objections to the draft of a report shall be necessary, nor can any exceptions be taken before the register to such draft; nor shall any exceptions to report be referred to the register, but the same shall be heard and decided, in the first instance, by the chancellor or court."

Illinois.—The absolute necessity of objections to findings of fact by the master, and the following up of same by proper exceptions in the trial court, has been uniformly insisted upon by the supreme court of Illinois.¹ In an early case the supreme court laid down the rule as follows: After the draft of the report is prepared it is the proper practice that the parties or their solicitors should be again called before the master, to hear the report read, when either party has an opportunity to take exceptions to the report, which exceptions should be argued before the master, who allows or disallows them, and in case he allows any of the exceptions, he reforms his report accordingly. When exceptions are disallowed, if the excepting party desires it, such exceptions so disallowed are sent up with the master's report, together with all the evidence relative thereto,² when the exceptions stand for hearing before the court. This practice, it is further said, "gives the master an opportunity of reconsidering the subject before his report is finally made, and of making such alterations as reflection and the suggestions of counsel may convince him are right; this saves much time and trouble in the circuit court, and fre-

¹ McClay, Adm'r, v. Norris, 4 Gilm. 569; Springer v. Kroeschell, 161 Ill. 370, 386; Brockman v. Aulger, 13 Ill. 358, 370, 43 N. E. 1084; Ennesser v. 277, 280; Whiteside v. Pulliam, 25 Hudek, 169 Ill. 494, 496, 48 N. E. 678; Ill. 285, 288; Hewitt v. Dement, 57 Ill. Marble v. Thomas, 178 Ill. 540, 53 N. 500; Hurd v. Goodrich, 59 Ill. 450, 456; E. 854; Gehrke v. Gehrke, 190 Ill. Prince v. Cutler, 69 Ill. 267, 271; Pen- 166, 175, 60 N. E. 59.
nell v. Lamar Ins. Co., 73 Ill. 303, 306; ² By statute now in Illinois all the
Brainard v. Hudson, 103 Ill. 218, 221; evidence taken by the master is re-
Singer v. Steele, 125 Ill. 426, 429, 430, quired to be sent up with his report.
17 N. E. 751; Cheltenham Imp. Co. v. Rev. Stat., ch. 22, § 39.
Whitehead, 128 Ill. 279, 284, 21 N. E.

quently avoids the necessity of a re-reference."¹ In a later case Judge Walker, writing the opinion, says: "It is first urged that, to have been heard and determined by the court below, the exception to the allowance of the claim of the appellant should have been taken before and disallowed by the master; that until such an exception is thus taken and disallowed, the parties cannot be heard on exceptions in the circuit court. This is announced as the better practice in the cases of *McClay v. Norris*, 4 Gilm. 370, *Brockman v. Aulger*, 12 Ill. 277, and other cases in this court. Such a practice as is indicated in these cases is more consistent, more speedy and saves costs, all of which is desirable and should be enforced in practice; and failing to take exceptions before the master, the objection should be regarded as waived. The practice imposes no hardships on the parties, as the master can always fix a day when he will hear exceptions to his report, when the parties should attend and be heard on their allowance, and if either party is dissatisfied with the master's decision, on requesting him, he will certify the evidence touching such items as were excepted to and decided by him, to the court, where his decision can be reviewed, and the exception allowed or rejected as may appear to be required by law."²

Michigan.—Under the former chancery practice in this state, by rule of court the master, after he has prepared his report, delivers copies thereof to the parties applying for the same, assigns a time and place for the parties to bring in exceptions and for "settling the draft of his report." The rule, by amendment, now requires the master to issue a summons notifying the parties of such time and place.³

§ 379. Practice in the state courts — Continued.— *New Jersey*.—Under the practice in New Jersey the master, after preparing his reports, does not, as under the English practice, give notice to the parties in order to give them an opportunity to inspect it, point out errors and suggest amendments; but the course there is for the master to take the testimony, and, after that is in, to hear the arguments of counsel,

¹ *Brockman v. Aulger*, 12 Ill. 277.

evidence with his report. Hurd's

² *Pennell v. Lamar Insurance Co.*,

Rev. Stat., ch. 22, § 39.

78 Ill. 308, 306, 307. The statute now requires the master to return all the

³ *Suydam v. Dequindre*, Walk. Ch. (Mich.) 23, 25.

after which he proceeds to make up his report. This being done, he files it without previously exhibiting it to counsel. The matter is then ripe for hearing on exceptions to be interposed to the report, and these are heard before the chancellor.¹

The English practice never received any strong recognition in this state. In an old case Chancellor Vroom says: "The intimation has several times been thrown out, that it would be proper to adopt the rule, and it has been done for the purpose of accustoming masters and solicitors to its operation. In this respect it has been serviceable, and it is believed the practice might now be safely pursued in all ordinary cases."² But the practice was afterward settled by the above rule.

New York.—Under the chancery practice as it formerly existed in the state of New York, it was the duty of a party dissatisfied with the master's findings of fact to file objections with the master. Equity Rule 109 provided that, when the master had prepared a draft of his report, he should deliver copies thereof to such of the parties as applied for the same, and should assign a time and place for the parties to bring in objections, and for settling the draft of the report, and should issue his warrant for that purpose; and that no summons to see the draft of the report, and take copies thereof, should be necessary. It further provided that, on the return of the warrant, or on such other day as might be assigned by the master for that purpose, if objections were filed by either party he might proceed to hear the parties on such objections; and that the master should settle and sign his report, and cause it to be filed in the proper office. This was, in short, the strict chancery practice with a slight variation as to the method of bringing the parties in to examine the report.³ Barbour says that a referee, if he chooses, may follow the chancery practice as laid down in Equity Rule 109, although it is usual now, in ordinary cases at least, for him, after the testimony is closed and the case finally submitted, to draw up and sign his report, and deliver it to the prevailing party without pursuing the former practice of submitting a draft, hearing objections, etc.⁴ The

¹ Van Ness v. Van Ness, 32 N. J. Eq. 729.

² Mech. Bank v. Bank of Brunswick, 3 N. J. Eq. 437.

³ 1 Hoffman, Ch. Pr. 544; 2 Barbour, Ch. Pr. 547.

⁴ Barbour, *loc. cit.* See also Van Sant, Eq. Pr. 568.

decisions of the chancery court of this state were uniformly in accord with the above rule. We have already seen that Chancellor Kent not only approved of the strict practice in this regard, but urged the importance of its enforcement, and the same may be said of Chancellor Walworth.¹

§ 380. *Practice in the state courts — Continued.*— *Pennsylvania.*— In this state it is provided by Supreme Court Equity Rule that, when the findings and decrees of a referee in an equity case are ready, he shall give notice to counsel for the respective parties of a time and place when and where the same may be examined by them, and that if no exceptions are filed within ten days after such examination, he shall deliver to the clerk of the court his findings, requests of counsel, and the form of decree; and that if exceptions are filed with the referee he shall hear them within ten days thereafter; and within ten days after such hearing decide upon the same and file such exceptions, his action thereon, together with his original findings, requests of counsel, and the form of a decree with the clerk of the court.²

Tennessee.— The practice in this state is somewhat of a compromise between the English practice of requiring objections to be filed with the master and the course followed in some of the federal courts under the construction of United States Equity Rule 83. There is in effect no preliminary draft of the report made for examination by the parties, and no hearing of objections before the master. The master, with such light as may be afforded him by oral or written statements of counsel in the progress of executing the reference, and often without any aid at all, makes up and files his report. The litigants examine it, and take such exceptions as occur to them, which are presented to the court when the cause is called for hearing.³ The court, however, recognizing the benefit to be derived from allowing the master to revise his report in the light of the exceptions taken thereto, adopted the following rule:

“Rule 28. It shall be the duty of counsel, upon filing exceptions to a master’s report, to bring such exceptions at once to

¹ *Remsen v. Remsen*, 2 Johns. Ch.

405; *Methodist Church v. Jaques*, 8

Johns. Ch. 77; *Byington v. Wood*, 589.

¹ *Paige*, 145.

² *Brewster*, Eq. Pr., § 5177.

³ *Gleaves v. Ferguson*, 2 Tenn. Ch.

the notice of the master, and the master shall thereupon consider *instantly* such exceptions, and, if he thinks them well taken, make a supplemental report to that effect; and, if not, refer by page to the particular parts of the record upon which he bases each item excepted to."¹

West Virginia.—Under the practice in this state, any party, without being at the expense of taking a copy, may inspect the report and file exceptions thereto. These exceptions, "with such remarks thereon as are deemed pertinent," are returned into court with the evidence relating thereto. It is also the right of any party to except to a report at the term at which the same is returned, or afterward by leave of court, but, to bring the evidence up as a matter of right, exceptions must be lodged with the master while the report is still in his office.²

Code States.—In the code states objections and exceptions are taken to the rulings of the referee made during the progress of a hearing, are preserved by a bill of exceptions, or embodied in the report, and are argued on a motion for a new trial in the same manner as if a case had been tried before the court.

§ 381. **Rulings of supreme court of the United States.**—While in no case has the question been presented to the supreme court of the United States, yet that court has repeatedly expressed its preference for the practice of filing objections with the master as a basis for exceptions subsequently to be taken. As early as 1839 we find this court indorsing the rule as follows: "Strictly, in chancery practice, though it is different in some of our states, no exceptions to a master's report can be made which were not taken before the master; the object being to save time and to give him an opportunity to correct his errors or reconsider his opinion. A party neglecting to bring in objections cannot afterwards except to the report, unless the court, on motion, see reason to be dissatisfied with the report and refer it to the master to review his report with liberty to the party to take objections to it."³

Authorities are cited by the court in support of each of

¹ Id. 592.

³ Story v. Livingston, 18 Pet. 859,

² Arnold v. Slaughter, 36 W. Va., 366.
589, 597, 15 S. E. 250.

these propositions. It is true that this was just before the promulgation of Equity Rule 83 in 1842, yet we find the court more than once repeating this same statement and citing the early case in its support, after the adoption of the above rule. For example, in 1855 we find the court quoting from the early case approvingly as follows: "In *Story v. Livingston*, 13 Pet. 359, this court decided that no objections to a master's report can be made which were not taken before the master, the object being to save time and to give him an opportunity to correct his errors and reconsider his opinion."¹

It is true, as stated by Judge Gresham,² that this question was not before the court, yet such expressions indicate pretty strongly what the court will do when a case arises presenting the question squarely. Again, in 1857, we find the court laying down the same rule.³ And again, in 1891, we find the same court quoting the same language from *Story v. Livingston*.⁴ Even as late as 1893 we find the court stating the correct practice as follows: "Proper practice in equity requires that exceptions to the report of a master should point out specifically the errors upon which a party relies, not only that the opposite party may be apprised of what he has to meet, but that the master may know in what particular his report is objectionable, and may have an opportunity of correcting his errors or reconsidering his opinion."⁵

If the reader will turn back to section 869 and read the remarks of the court in the case of *Gay Mfg. Co. v. Camp*, in the fourth United States circuit,—a case in which Chief Justice Fuller sat with Judges Goff and Simonton,—I think he will be satisfied that the highest authority in this country is in favor of the strict rule and the propriety of its enforcement.

§ 382. **Exceptions to the rule.**—An apparent variation from the rule requiring objections to be filed with the master as a basis of future exceptions occurs in the cases of two or three kinds of certificates granted by the master, as the certificate of sufficiency or insufficiency, or scandal or impertinence

¹ *McMicken v. Perin*, 59 U. S. (18 How.) 507, 510.

² *Hatch v. Indianapolis & Springfield R. Co.*, 11 Biss. 188, 9 Fed. 856.

³ *Hudgins v. Hudgins*, 61 U. S. (20 How.) 54.

⁴ *Topliff v. Topliff*, 145 U. S. 156, 173, 12 Sup. Ct. R. 825.

⁵ *Sheffield, etc. R. Co. v. Gordon*, 151 U. S. 285, 290, 14 Sup. Ct. R. 343.

in any pleading, or other matter before the court, or the certificate allowing interrogatories. In these instances exceptions may be filed without the necessity of objections previously taken.¹ So, too, neither objections nor exceptions are required when the error complained of is an alleged wrong conclusion of law, or when error complained of is apparent upon the face of the report. This subject is fully discussed in a future chapter.² We will simply state here that in all cases where the chancellor reviews the action of the master, not upon exceptions, but on petition, motion, or otherwise, of course no objections are left with the master.³ It is also said that in some few cases, and under special circumstances, where a party has neglected to leave objections to the draft report, the court may allow exceptions to be taken; thus, exceptions were allowed to be taken in *Carter v. Clitheroe*, where, by surprise, as to which there was an affidavit of the defendant's solicitor, the master signed his report before objections were taken, Lord Hardwicke referred it back to the master to receive objections.⁴ In another case objections were not left in consequence of the warrant to settle, the master's report not having been sent to the party; the court allowed exceptions to be filed.⁵ So, also, the court may re-refer a case to the master with leave to file objections, where the failure was by reason of ignorance or misapprehension of counsel as to the rule.⁶ Sometimes the court will consider exceptions where failure to file objections was by reason of misapprehension of the rule, and will go on and dispose of the case on its merits, contenting itself with an admonition that the rule must be observed in the future.⁷ In another case, where counsel failed to file objections with the master, the court permitted, after the coming in of the report, objections to be filed with the master *nunc pro tunc*, instead of re-referring the cause.⁸

¹ 2 Barbour, Ch. Pr. 547; 2 Smith, Ch. Pr. 150.

² *Post*, ch. VII; *post*, §§ 436-442.

³ 2 Smith, Ch. Pr. 150; 2 Barbour, Ch. Pr. 547.

⁴ 2 Smith, Ch. Pr. 152.

⁵ *Bowker v. Nickerson*, 3 Madd. 439.

⁶ See *ante*, § 372, where Judge Sevens of the sixth United States cir-

cuit re-referred a case to the master for this reason.

⁷ *Gaines v. New Orleans* (U. S. Cir. Ct., 5th Ct.), 1 Woods, 104; *Fed. Cas.* 5,177; *Gay Mfg. Co. v. Camp* (U. S. C. C. App., 4th Ct.), 65 Fed. 794, 68 Fed. 67.

⁸ *Fischer v. Hayes*, 16 Fed. 469.

§ 383. Time of leaving objections with the master.—Although, in strictness, objections ought to be taken within the period between the time of service of the notice and draft report and a time fixed in such notice for filing the same, yet, upon a proper case or excuse being submitted to him, the master will allow further time for bringing in the objections.¹ It is too late to bring in objections after the report has been signed and returned into the clerk's office, as, when that is done, all power of the master under the order of reference is terminated. The master, however, may ask and obtain from the court leave, in a proper case, to withdraw his report for the purpose of correction of errors; and, in a proper case, where counsel, through ignorance, mistake or inadvertence, has failed to file objections with the master, the court may refer the cause to the master with leave to file objections.²

Under certain circumstances objections may be permitted to be filed with the master *nunc pro tunc*; for example, where it appeared by the certificate of the master that the respective counsel were notified that the draft of the report was ready for their inspection and suggestions, whereupon they appeared before him; that the plaintiff's counsel verbally objected to certain findings; and that the written exceptions which had been filed in court were substantially the same as the verbal objections presented to the master when the draft report was submitted, while the course pursued by counsel was held to be faulty, yet the court allowed objections to be reduced to writing, substantially corresponding with the exceptions, and permitted them to be filed with the master *nunc pro tunc*.³ Sometimes the instructions to the master in the order of reference fix a specific time for filing objections to the master's findings, and all objections not filed in such time, or in such further time as shall be allowed by the master, are deemed to be waived.⁴

§ 384. Who may file objections with the master to draft report.—It may be broadly stated that any party who is entitled to appear before the master upon a reference must file objections to his draft report in order to enable such party to

¹ 2 Barbour, Ch. Pr. 547.

² See *post*, §§ 450-452.

³ Fischer v. Hayes, 16 Fed. 469.

⁴ March v. Eastern R. R. Co., 48 N. H. 515, 535.

contest the findings of the master afterward by exceptions.¹ Either or both parties may object in the first instance to the master's report, and both parties may afterward except to the final report, and either party may set down the cause for hearing upon the exceptions to the master's report.² If a person interested in the report, though not a party to the suit, is dissatisfied with it, he must file objections to the draft in the master's office as a preliminary step to putting himself in a situation to take exceptions.³ So, too, defaulted parties desiring to contest the correctness of the master's findings of fact must file objections to the draft report.⁴ If the parties are satisfied with the facts as found by the master, and the question is solely as to the law applicable to such a state of facts, then no objections or exceptions are necessary to enable the court to determine whether or not the master erred in his legal conclusions.⁵

§ 385. What may be objected to and character of objections.—Objections should be taken to the principal findings of fact made by the master, that is, findings of fact upon the ultimate issues submitted to him by the order of reference. Counsel must be careful to distinguish the terms "objections" and "exceptions" to the master's findings from objections made to the admission or exclusion of evidence, or to other matters, made during the progress of the hearing and from exceptions taken to the rulings of the master thereon. The term "objection," in the sense in which it is now used, is the formal, written protest of counsel to the master's findings upon the issues of fact submitted to him, and the term "exception" as used in this section applies solely to the paper filed in the office of the clerk, after the coming in of the report, as a basis for testing the legality or propriety of objections previously left with the master. These terms are often

¹ As to whom are entitled to appear in the master's office upon a reference, see *ante*, §§ 184, 185.

² *Union Sugar Refinery v. Mathieson*, 8 Clif. 146, 149, Fed. Cas. 14,398.

³ 2 Smith, Ch. Pr. 152.

⁴ *Brockman v. Aulger*, 12 Ill. 277, 279; *Hurd v. Goodrich*, 59 Ill. 450, 455; *Pennell v. Lamar Ins. Co.*, 73

Ill. 303; *Dates v. Winstanley*, 53 Ill. App. 623, 627; *Burke v. Tutt*, 59 Ill. App. 678; *Cheltenham Imp. Co. v. Whitehead*, 128 Ill. 279, 284, 21 N. E. 589. As to the rights of defaulted parties upon a reference, see *ante*, §§ 211-213.

⁵ *Kingsbury v. Kingsbury*, 30 Mich. 212.

erroneously used as if interchangeable, even by judges in writing their opinions.¹ Objections may state that some evidence has been misunderstood, some fact not found, or improperly found, or that some irregularity or error is apparent on the face of the draft of the report.² An objection, however, is unnecessary where error is shown on the face of the report or is an error as to conclusion of law. This subject is fully discussed hereafter.³ Both objections and exceptions should be signed by counsel.⁴

As the objections filed with the master are the foundation for exceptions, afterward to be taken upon the coming in of the report, and as the latter must strictly follow the objections, great attention is required in framing them, so that the points and matters to be contested may properly be brought before the court.⁵ Indeed, in actual practice, objections filed with the master are usually afterward, by consent, converted into exceptions, and, no matter whether this is done or whether the exceptions are written out independently, the same care and exactness is required in the framing of objections as is required in the preparation of exceptions; but, as this subject is fully examined in a subsequent chapter, nothing further need here be added,⁶ except to say that they must be specific or they will be disregarded.⁷ For example, if the objection is that there is a variance between the proof and allegations such objection must be specific; in other words, it must point out specifically in what the alleged variance consists.⁸ That is, the objector must put his finger on the precise spot in order that both the master and opposing counsel may know definitely what is claimed to be erroneous. The rule that exceptions and objections to master's findings must be

¹ Whiteside v. Pulliam, 25 Ill. 285, 288; Hewitt v. Dement, 57 Ill. 500, 507; Pennell v. Lamar, 73 Ill. 303, 306; Brainard v. Hudson, 103 Ill. 218, 221; Cheltenham Imp. Co. v. Whitehead, 128 Ill. 279, 284, 21 N. E. 569; Gehrke v. Gehrke, 190 Ill. 166, 175, 60 N. E. 59.

² Bennett, Pr. in Master's Office, 21.

³ Post, § 439.

⁴ Bennett, Pr. in Master's Office, 22.

⁵ 2 Smith, Ch. Pr. 151.

⁶ "Attacking Master's Findings of Fact," post, § 431 et seq.

⁷ Rittenhouse & Embree Co. v. Barry, 98 Ill. App. 548, 554; Bishopp v. Blair, 90 Ill. App. 64, 81; Thornton v. Commonwealth L. & B. Ass'n, 181 Ill. 456, 458, 54 N. E. 1037; Kinsella v. Cahn, 185 Ill. 208, 56 N. E. 1119.

⁸ Thornton v. Commonwealth L. & B. Ass'n, 181 Ill. 456, 458, 54 N. E. 1037, and cases cited.

specific does not conflict with the other rule that, in chancery, it is not necessary to take exceptions to the various decisions of the master, or court, made in the progress of the trial.¹

§ 386. *Form of notice.*— Notwithstanding that in some of the federal circuit courts the English rule requiring the filing of objections with the master has been relaxed, and the looser practice prevails of allowing parties to file exceptions to the report not based on any previous objections, under, as I think, an erroneous construction of United States Equity Rule 83, yet the better course in all cases is to submit a draft report to counsel, and permit them to file objections with the master if they so desire, as a foundation for exceptions to be afterwards filed with the clerk. Such a course in no way conflicts with the provisions of the rule referred to.

Notice that the draft report is prepared and ready for inspection should be regularly served upon all parties interested, that is upon all parties who are entitled to appear before the master, no matter whether they appeared or not.² For example, parties defaulted for want of an answer, though they have never appeared before the master, and creditors, who, by leave of court, come in to prove up their claims, are entitled to this notice. In a case where there are complainants, cross-complainants, defendants, cross-defendants and creditors, who came in to prove up their claims, the notice may be in form as follows:

Notice that Draft Report is Ready.

STATE OF ILLINOIS, }
County of Cook. } ss. In the Circuit Court of Cook County.

Robert T. Sanderson	} Gen. No. 192,784. Term No. 6,848. In Chancery.
v.	
Adam H. Miller,	
Clara J. Miller,	
James T. Fry and George W. Drexel.	

To John A. Barnes, solicitor for complainant, Aaron V. Shaw, solicitor for cross-complainant, William H. Barrow, solicitor for defendants, Henry W. Brown, solicitor for cross-

¹ Thornton v. Commonwealth L. & Connecticut Mutual Life Ins. Co., 57 B. Ass'n, 181 Ill. 456, 459, 54 N. E. Ill. 424.

1037; Chicago Artesian Well Co. v. ² As to who are entitled to appear, see ante, §§ 184, 185.

defendants, and Charles D. Wharton, solicitor for John I. Rogers and Samuel P. Mills, creditors, who, by leave of court, came in to prove up their claims:

Please take notice, that I have prepared a draft of my report in the above entitled cause, and that Monday, the 22d day of September, A. D. 1902, will be the last day for filing objections to the same.

WM. FENIMORE COOPER,

Master in Chancery of the Circuit Court of Cook County.
Dated, Chicago, Illinois, September 18, A. D. 1902.

Received a copy of above notice, this September 18, A. D. 1902.¹

Form of Notice, United States Circuit Court.

Circuit Court of the United States for the Southern District
of New York.

John Jones, Plaintiff,	} In Equity.
v.	
Richard Roe, Defendant.	

Sirs: You are hereby notified that I have prepared the draft of my report upon the matters referred to me as master, by the interlocutory decree herein, dated the 30th day of November, A. D. 1901, and that a copy of such draft report accompanies and is annexed to this notice and is herewith served upon you; you are also hereby notified that I shall sign and file said draft report as my report herein, unless alterations are made by me therein, upon suggestions of counsel for either party hereto, and that I appoint the 19th day of January, A. D. 1902, at my office, room 10, No. 27 Wall street, in the city and county of New York, at 11 o'clock in the forenoon of said day, for counsel for either party hereto to present to me any suggestions of amendments to or alterations of said draft report, and to file with me written objections thereto, if any they have to the same,

Yours, etc.,

CORNELIUS DEWEY, Master.

Dated, New York, December 18, A. D. 1901.

To Messrs. Colt & Hine, Plaintiff's Solicitors, 1092 Broadway, and Thomas Bradley, Defendant's Solicitor, 130 Broadway, New York City.²

¹ If the parties do not acknowledge service, then affidavit should be made. For form, see *ante*, § 199.

² Adapted from Beach's Modern Equity Practice, vol. 2, p. 1308.

§ 387. **Form of objections to draft report.**—The objections to the master's draft report may be as follows, to wit:

Objections to Draft Report.

Circuit Court of the United States for the Southern District
of New York.

John Jones, Plaintiff,	} In Equity.
v.	
Richard Roe, Defendant.	

Objections taken by Richard Roe, defendant in this cause, to the draft of the general report of Cornelius Dewey, the master to whom this cause is referred.

First. For that the said master hath not, in and by the draft of the said report, charged the plaintiff with the sum of \$480.00, being one quarter's rent due from the plaintiff to the defendant from January 1, 1902, to April 1, 1902, which sum the master should have charged against the plaintiff.

Second. For that the said master hath disallowed the credit taken by this defendant in Schedule G. of the accounts filed with the said master, of the sum of \$2,511, under date of December 15, 1901, which sum said master ought to have allowed as a credit to this defendant.

Third. For that, etc.¹

In all which particulars the defendant submits that the draft of said report ought to be varied and altered.

JOHN M. BROOKS,
Solicitor for Defendant.

§ 388. **Passing upon objections to draft report.**—The filing of objections with the master of course implies that they must be passed upon by him. If he sustains an objection he modifies or reverses his finding, as stated in the draft report, as the case may be. It is said that the mere filing of objections to the master's report is not sufficient, but the party must appear before him with due diligence to proceed upon the same, and if he does not the master should overrule his objections, noting that he does so because the party would not appear to support them, and proceed as if no objections had been taken to his report.² Yet, in actual practice, parties are not required or expected to appear before the master and pre-

¹ 2 Newland, Ch. Pr. 375; 3 Hoffman, Ch. Pr. 166; Hoffman, Master in Chancery, 358; Bennett, Master's Office, 125.

² Quin v. Bodkin, 1 Beatty, 338; 3 Barbour, Ch. Pr. 548.

sent an argument in support of their objections, and, failing so to do, the master examines the same and corrects the error pointed out, if satisfied of its existence, otherwise he overrules the objection and the question is thus passed on to the chancellor for revision. If either party desires to present an argument in support of objections, the master should fix a time when he will hear the same. Of course, if the master, upon reconsideration of his finding, in the light of objections specifically pointing out alleged errors, is satisfied that the objection is well taken, he should cheerfully make the desired correction.

Many errors pointed out by objections to the draft report relate to mistakes of computation, or other matters, which need only to be indicated to require correction; yet, in graver and more important particulars, the master, like the chancellor, when once convinced that he has committed an error or mistake as to a conclusion of either law or fact, should never allow either his pride or dogged persistence to interfere with the discharge of a duty, but should frankly concede and correct the error, and thus, perhaps, save the parties the delay and expense of a re-reference. It is said to be the duty of the chancellor, when satisfied that he has committed an error, to correct it at the earliest opportunity,¹ and, of course, the same rule applies to masters in chancery. Yet, conclusions arrived at after full argument and mature consideration should not be lightly changed.

The hearing before the master on objections to his findings is in the nature of a rehearing as to all matters previously contested and covered by such objections. As to all matters upon which full argument has been heard and carefully considered by the master, his conclusions or findings based thereon should not be disturbed, unless the objecting party shall be able to convince him that he has made a mistake or otherwise has committed error. Unless the objecting party can or does present some new and substantial reason therefor, the master should adhere to his findings. It is hardly in the power of the human mind, surely not of the sound judicial mind, after

¹Gibson v. Rees, 50 Ill. 383, 410; R. 133; Fish v. Farwell, 160 Ill. 236, Fourniquet v. Perkins, 16 How. (U. S.) 241, 43 N. E. 367; Jeffery v. Robbins, 82, 86; Fort Dearborn Lodge v. Klein, 167 Ill. 375, 387, 47 N. E. 725. 115 Ill. 177, 181, 3 N. E. 272, 56 Am.

forming deliberate opinions on long arguments and much examination, to change at once its conclusions, merely on a repetition of the same arguments and the same facts. Opinions thus liable to change would be as worthless after alteration as they were before. The changes which are valuable and to be reasonably expected are on new matter, new light, new information.¹ Judge Story, speaking of such fickleness of judgment, remarked: "I fear that suits would become immortal."²

The practice is not uniform among the masters in Chicago in reporting to the court the disposition made of objections to their findings filed with them after making up their draft reports. Some of them set out a full statement of each objection and the disposition of same, with an argument in support of the position taken by the master, while others make a short, general statement of the objections and their rulings thereon, and yet others are content with a bare statement of their action indorsed on the back of the objections. Of the first it may be said that it has its advantages and disadvantages. Masters, like judges, take pride in having their findings sustained, and this course enables the master to present to the court fully his reasons in support of his action thereon, but against this it is said to be unfair for the master, who has made a judicial ruling upon a matter before him, to send an argument along with it, in favor of the contention of one of the parties, a course absolutely useless, unless intended to influence the chancellor whose duty it is to review such ruling. Judge Higbee, one of the ablest judges Illinois ever produced, used to say, in reply to counsel's request for reasons in support of his rulings, "If the court is right there is no necessity to give any reasons; if wrong, the less said about it the better." Where a master sustains an objection he modifies his report accordingly, when, if the objecting party is still dissatisfied with the master's finding, it is his duty to again object, as it is only the master's act in *overruling* objections that he can ask the court to review. It is probably the better course for a master, where he overrules an objection, to simply say so in the fewest possible words.

¹ Mr. Justice Woodbury in *Tufts v. Tufts*, 3 Woodb. & M. 426, 429, Fed. Cas. 14,282.
² *Jenkins v. Eldridge*, 3 Story R. 299, 305, Fed. Cas. 7,267.

§ 389. Form of supplementary report overruling objections to draft report.—While the master, if he chooses, may content himself by simply stating the objections filed and which of them were overruled, yet, if he prefers, he may present the matter to the court by way of a supplementary report, which may be in the following form:

Supplementary Report.

I, William Fenimore Cooper, master in chancery of the circuit court of Cook county, in the state of Illinois, do further report that, after the completion of my draft of the foregoing report, I did, on the 8th day of September, A. D. 1902, serve notice on the solicitors of all parties to said cause that said draft report was ready, and would remain at my office for inspection until 2 o'clock P. M. on the 18th day of September, A. D. 1902, until which time they could file objections to the same; and afterward, on the 16th day of September, A. D. 1902, Samuel L. Wilson, solicitor for the defendants, filed objections to said draft report, said objections being herewith returned to the court and numbered from 1 to 16 inclusive, and that afterward, on the 22d day of September, A. D. 1902, I was attended by and heard the argument of counsel, and, after giving the same due consideration, I overruled each and every one of said objections; all of which is respectfully submitted.

Dated this September 24th, A. D. 1902.

WM. FENIMORE COOPER,

Master in Chancery, Circuit Court, Cook County, Illinois.¹

V. MASTER'S REPORT.

§ 390. The master's report — Definition.—The only means of communication *from the court to the master* is by an order of the court, and the only means of communication *from the master to the court* is by a report or certificate. There must first be an order of the court directing the master to discharge some duty before there is any occasion on the part of the master to make any report or certificate as to any matter. The only means of communicating information from the master's of-

¹ Master Cooper informs me that his usual practice is simply to mark the objections overruled; attach notice that draft report was ready for inspection, with proof of service of same, and return them into court with the report.

fice must be by statements in writing under the hand of the master. These statements in writing are divided into two classes — reports and certificates, and the former are again divided into general reports and separate reports. Maddock gives the following definition of a master's report: A report is a master's certificate to the court, of the facts or matters directed to be ascertained by him, or how, upon examination, they appear to him, or of something which it is his duty to inform the court.¹ In another old work we have a similar definition, as follows: "A report is a Master's certificate to the Court, how the facts or matters referred to him by the Court to examine are, or do appear, or of somewhat which it is his duty to inform the Court of."²

The master's report may be for the purpose of informing the court as to the manner in which a master has performed a ministerial duty under an order of the court, such as making a sale of real estate in a foreclosure proceeding, or it may be as to his conclusions of fact and law upon a reference where the master is required to find and report the same to the court. In a case of the latter kind the supreme court of Illinois define a master's report to be a document exhibiting the master's findings and conclusions, the object of which is to show the proceedings which have been had under the order of reference, the evidence which has been taken, and the findings and conclusions reached by the master according to the terms of the order of reference, in such a manner that intelligent action may be had thereon by the court.³

A *General Report* is that which comprises the conclusion which the master has come to upon all the matters referred to him by the order of reference under which he has proceeded.

A *Separate Report* is that which includes one or more separate matters contained in the order of reference and the conclusion which the master has arrived at thereon, and is limited thereto apart from the other matters referred.

A *Special Report* is a report of special circumstances found by the master, or arising during the progress of the reference,

¹ 2 Maddock's Ch. Prac. 668. See *Elmslie v. M'Auley*, 3 Bro. C. C. 626. ² Schnadt v. Davis, 185 Ill. 476, 482, 57 N. E. 652; 17 Encyc. Pl. & Pr.

³ Pr. Reg. Ch., p. 377.

1033.

as a guide to the court for some further direction upon the facts so reported.¹

If any of the inquiries directed by the decree are such as cannot conveniently be delayed until the general report, the master may make a separate report, which is prepared, disputed and confirmed in the same manner as a general one, the only difference being that when it is intended to act on such a report the cause is not set down for further directions, but a petition is presented praying such directions as are consequent on the separate report.² A separate report, of course, only embraces one of the objects of reference, in relation to which an immediate action of the court is expedient.³

§ 391. **Definition — Continued.**— The habit of making separate reports or certificates while a reference is pending has always, to a great extent, been discouraged by the courts; for example, in 1635 we find Lord Coventry laying down the following rule: "The masters are not upon the importunity of counsel (how eminent soever), or their clients, to return special certificates to the Court, unless they are required by the Court so to do, or that their own judgment, in respect of difficulty, leadeth them unto it; such kind of certificates for the most part occasioning a needless trouble, rather than ease to the Court, and certain expense to the suitor;" so Lord Bacon, to meet the same difficulty, laid down the following order: "The Masters of the Court are required not to certify the state of any cause, as if they would make breviates of the evidence on both sides, which doth little ease the Court, but with some opinion, or otherwise, in case they think it too doubtful to give opinion, and, therefore, make such special certificate, the cause is to go on to a judicial hearing, without respect had to the same."⁴

Special reports on matters which the master himself has power to adjudicate upon, are not to be made unless the master is specially directed so to do by the order of reference;⁵ or

¹ Holmsted & Langton's Judicature Act of Ontario, 1898, p. 864;

² Daniell's Ch. Pr. 1294; Beach, Eq. Pr., sec. 694.

³ Adam's Equity (7th Am. ed.), 385.

⁴ Bennett's Master in Ch. 18; 2 Browne's Ch. Pr. 851; Hoffman, Ch. Pr. 548.

⁵ Beames' Orders in Ch., pp. 208, 223.

⁶ Walmsley v. Bull, 2 Ch. R. 344. But see Lavin v. O'Neill, 13 Gr. Ch. 179; Clouster v. McLean, 10 Gr. Ch. 576.

where, from the difficulty of the subject, the master thinks it proper.¹

A certificate (as it immediately concerns the administration of equity in this court) is a matter in writing under the hand or hands of assistants, officers, ministers, or delegates of the court, informing the court of something under their respective administration or cognizance that is done, not done, or misdone; which a standing or other order, or the mandate of the court, or their duty, or the reason of the thing requires them to acquaint the court with.²

There is some confusion in the books as to the distinction between a master's report and a certificate. Some of the authorities recognize a clear dividing line, while others fail to see any difference between the two. Vice-Chancellor Wigram speaks of master's "certificates, or reports in the nature of certificates."³ A distinguished English jurist, Vice-Chancellor Shadwell, speaking of master's reports and certificates, says: "I am not aware of any distinction between a *Master's Report* and a *Master's Certificate*. The *Practical Register* defines a Certificate to be a matter in writing under the hand of Officers of the Court; and defines a Report to be a *Master's Certificate* to the Court. . . . But, though we apply the term Report to the more lengthened Productions of a *Master*, and the term Certificates to his shorter statements, it is, I think, clear that all his Reports are Certificates, and all his Certificates are Reports."⁴

In one case it is said that in order to take notice of anything in the master's office there must be a report.⁵ In this case Lord Hardwicke said: "I never heard of such a thing as a certificate of a master." This expression, however, is not an unusual one, "where some short fact is the substance of the master's inquiry."⁶

In the light of what has been said the master's communications to the court may be classified as follows:

First. General Reports upon the whole of the matters submitted by the order of reference.

¹ 2 Maddock's Ch. Prac. 387.

⁴ Chennell v. Martin, 4 Sim. 340,

² Pr. Reg. Ch., p. 100; 2 Harr. Ch. Pr. 842-844.
(ed. 1807) 135.

⁵ Fox v. Mackreth, 1 Ves. 69.

³ Ottey v. Pensam, 1 Hare, 322, 324.

⁶ Carlton v. Smith, 14 Ves. 180.

Second. Separate Reports, being the master's statement to the court as to some of the matters so submitted to him.

Third. Special Reports or certificates, being statements to the court as to some matter arising during the progress of the hearing and which it is proper should be made known to the court.

It is only as to the last that the terms *report* or *certificate* may be used interchangeably. For example, if a refractory witness refuses to answer a proper question, the master may *report* or *certify* such fact to the court in order that proper action may be taken in regard to the matter.

§ 392. **Must be made by the master.**—The report must be the work of the master to whom the cause is referred. He must make out and return his report without any assistance from the court. "A motion to ask the opinion of the court as to the form of a report of a master is improper."¹ It is also improper for the master to seek information upon points of practice arising in his office.² The suitor has the right to the master's judgment, and then the matter may be further questioned by exceptions.³ The master to whom a cause is referred to examine and report must report his own opinion, not the opinion of others, or an opinion founded on that of others.⁴ This opinion or conclusion of the master must be based on facts established by the evidence. But there is no rule or principle of law which forbids parties or their counsel from making calculations and submitting them to the master for his consideration. The master may not be bound to receive and examine such documents, but if he thinks proper to do so he does not transcend his powers. If he finds such calculation correct he may adopt it as his own. By verifying its correctness and incorporating it in his report he does adopt it; and if it be in fact correct, it matters not that it originated with one of the parties or his counsel, and not with the master himself. No injustice can be done by making the process one of revision rather than one of original computation. Correctly applied to the same materials, figures will yield the same result,

¹ *Agar v. Gurney*, 2 Mad. R. 889; 2 Smith, Ch. Pr. 142.

² *Hoffman's Masters in Chancery*, 63.

³ *Rowe v. Gudgeon*, 1 Ves. & Bea. 831.

⁴ *In the Matter of Heaton*, 21 N. J. Eq. 221.

whether employed by the deciding mind in the first instance, or after a previous employment by another mind. It is of no consequence that the master is led if he is not misled.¹ Cases have arisen where counsel have prepared the whole report to conform to their views presented upon the argument of the case before the master, and asked him to adopt it. No good reason can be urged against this practice.

Not only is it true that the report must be that of the master, but it must be full and complete. As to all matters submitted to the master for his adjudication by the order of reference, it is his duty to act, and that, too, without the assistance of the court. It is not proper to state any such question in his report and submit it to the court for decision, and if the report comes back to the court in such improper shape, that is, only partially executed, the proper course is to refer it back to the master for completion. To return such a report to the chancellor, whatever the motive may be, is simply a failure to discharge a duty enjoined upon him by the court.² It is, therefore, improper for the master to submit the question to the court whether a party should be charged with an item in an accounting,³ or whether a particular debt is an asset of the estate being administered.⁴

§ 393. **Must conform to order.**—The master must constantly keep in mind that he is appointed by the court to assist it in various proceedings incidental to the progress of a cause before it, and he is usually employed to take and state accounts, to take and report testimony, to perform such duties as require computation of interest, the value of annuities, the amount of damages in particular cases, and similar services. In other words, he finds all the facts bearing upon the matters referred to him, and reports them to the court to aid it in coming to its conclusions upon the case made. To make this aid effectual all the matters referred should be reported on. If, in the progress of the references, the parties neglect or omit to bring before the master all the facts bearing upon the matters referred, and necessary to a correct conclusion by the court, they

¹ Price v. Comer, 87 Ga. 468, 469, 14 S. E. 122. See *ante*, § 147.

² Id.

³ Clouster v. McLean, 10 Gr. Ch.

⁴ Walmsley v. Bull, 2 Ch. Cham. 576, 578. (Canada), 344.

are in default. And by this default the court is deprived of aid sought in ordering the reference. If the master omits or neglects to report all the facts produced before him bearing upon the matters referred, he is in default. The parties are put to a disadvantage, and the report should be recommitted, unless the parties supply the omission by stipulation.¹

It is the duty of the master to report specifically his findings of fact on each issue litigated before him and his rulings upon the law on issues of law so made. And if for any reason he has not done so the report should be again referred to him with directions.² He must report on everything submitted to him; in other words, he must discharge the duties directed in his order.³ The order of reference circumscribes the limit of the master's investigation. His report and conclusions must be upon matters referred to him. It is no part of his duty to report upon collateral matters not raised by the issues.⁴ Therefore, in the discharge of his duty, he must follow the directions given in the order of reference, and if he fails to do so an exception on that ground will be sustained.⁵ In other words, it is the duty of the master to make his report conform to the directions of the decree.⁶ Where there are several important matters in controversy between parties, it is the duty of the master to find specifically as to each of them, so that, if it is desired, exceptions may be properly taken, and a review had thereon by the court.⁷ In making his report conform to the order of reference it is the duty of the master not only to report upon all matters submitted, but he must also be careful not to go beyond the matters so referred to him; if he does, his report, so far as it relates to such matters, is a nullity. So, too, a reference to a master will not authorize a report more extensive than the allegations and proof.⁸ If his report goes

¹ Gay Mfg. Co. v. Camp, 15 C. C. A. 226, 68 Fed. 67.

² Reynolds v. Martin, 55 Ga. 628, 629.

³ Winter v. Innes, 4 M. & C. 101; Jenkins v. Briant, 6 Sim. 605; Gaylor v. Fitzjohn, 1 Keen, 469.

⁴ Fordyce v. Shriver, 115 Ill. 530, 540, 5 N. E. 87.

⁵ Hays v. Hays, 3 Tenn. Ch. 88; Maury v. Lewis, 10 Yerg. 115.

⁶ Goodman v. Jones, 26 Conn. 264; West v. Howard, 20 Conn. 581; Brainerd v. Arnold, 27 Conn. 617, 627; Callender v. Colegrove, 17 Conn. 1.

⁷ Walker v. Hosack, 56 Kan. 468; McMullen v. Schermerhorn, 48 Kan. 739.

⁸ White v. Walker, 5 Fla. 478, 486.

beyond the order of reference, the court will not respect it.¹ Lord Bacon's order, that "No report shall be respected in court which exceeds the order of reference,"² is as true to-day as it was when promulgated centuries ago.³

§ 394. What it must contain.— While the master should carefully avoid the too common practice of padding his report with unnecessary and immaterial matters, yet he should just as carefully avoid falling into the opposite extreme — that of presenting a mere skeleton, so meager in details as to be unintelligible, or, as it is well stated by the supreme court of Tennessee, "while the report of the master should not, upon the one hand, contain, as has sometimes occurred, copies of depositions at length, it should not, upon the other, be a mere skeleton, presenting nothing more than a grim array of figures. Each of the items in it should be numbered; and where these items rest upon accounts, receipts, or other vouchers, they should be numbered correspondingly; and where they are supported by depositions, the pages of the depositions should be referred to. . . . A master should not be deterred by the apprehension of being charged with a desire to increase his fees, from stating the grounds of his action in a concise and intelligible manner."⁴ A master's report should show in what way the master arrived at his conclusion, so far as to enable the court to determine from the report itself whether his method was right or not.⁵

His office "is to inquire and report upon facts, not to decide — inquisitorial, rather than judicial. He is not a vice-chancellor, nor are his duties those of the master of the rolls, under the English system. His conclusions have no validity whatever, until adopted and vitalized by decree of the chancellor. Hence, arguments and processes of reasoning are out of place in his reports; they should give only results, stated clearly, succinctly, and intelligibly, with proofs on which they rest — all

¹ Clouster v. McLean, 10 Gr. Ch. 576.

² Beames' Orders in Chy., p. 23.

³ Gore v. Poteet (Court Ch. App. Tenn.), 46 S. W. 1050; McMahon v. Paris, 87 Ga. 660, 13 S. E. 572; Daniell's Ch. Pr., vol. 2, p. 1296. For a full discussion of the author-

ity and duties of the master under an order of reference, see *ante*, §§ 160-163.

⁴ Green v. Lanier, 5 Heisk. (Tenn.) 662, 671.

⁵ Frazier v. Swain, 36 N. J. Eq. 156.

else is superfluous.”¹ His report should present a correct statement of the proceedings as they occurred in his office, and to this end, if an objection to the competency of a witness is entered inadvertently in the wrong place the master may erase it and insert it elsewhere, so as to make a true record of the time when the objection was interposed.² Where the order is to take an accounting concerning a certain matter and that the master report his finding to the court, it is the duty of the master to merely report his findings. He is not required to make an argument, state reasons for his findings, or describe the mental processes by which he arrived at them, and such statements if made should be regarded as extra-official.³

Sometimes a rule of court prescribes certain duties to be performed by a master under an order of reference, and certain matters to be embodied in his report, in which case, of course, the authority of the master must be looked for in the order, the pleadings and the rule of court. For example, Chancery Rule 164, in New Jersey, provides:

“On a reference in a suit for divorce, the master shall take down and report the testimony in such manner that it may appear whether the facts sworn to are within the personal knowledge of the witness, or are from hearsay or reputation; and the master shall not report any evidence from hearsay or reputation which shall appear to him to be illegal, unless the complainant or his counsel insists that the same is legal; and such master shall report distinctly what facts alleged as the ground for divorce are proved to his satisfaction, and also what facts necessary to give jurisdiction are so proved; and in suits based on desertion shall examine into and report the facts and circumstances under which the desertion took place and the reasons which caused or provoked it, if the same can be ascertained.”⁴

§ 395. What it must contain — Continued.— In a divorce proceeding, if the master fails to comply with this rule the cause will be re-referred to him to enable him to do so.⁵

¹ Evans v. Evans, 2 Coldw. (Tenn.) 143, 152.

² Laing's Ex'rs v. Byrne, 84 N. J. Eq. 52.

³ North Chicago St. R. R. Co. v. Le Grand Co., 95 Ill. App. 435, 461.

⁴ Dickinson, Chancery, p. 466.

⁵ Stone v. Stone, 28 N. J. Eq. 409; Leaming v. Leaming, 25 N. J. Eq. 241; Pullen v. Pullen, 29 N. J. Eq. 541.

In the same state a rule of court, relative to master's reports generally, provides that they "are not to write opinions, but will merely advise the order or decree by advisory certificate at the foot thereof, and whenever it shall appear to be necessary or proper to do so they will report to the chancellor the grounds of the order or decree by a mere concise statement of the facts found and the conclusion thereon."¹ So, too, upon a reference to an auditor in the state of Georgia who, under the code, performs the duties formerly discharged by a master, in a reference it is provided that he shall, in his report, make an accurate statement of all motions made before him and his rulings thereon, and shall "reduce to writing a brief of the oral and documentary evidence submitted by the parties." It is further provided that "at the request of either party, any original document introduced in evidence shall be properly identified and attached to the report in lieu of a brief thereof."²

In presenting his "correct statement of the proceedings as they occurred in his office," he should not fail to have the report show proper service of notice upon all parties who are entitled to notice, and especially is this true as to such parties who are entitled to notice and who fail to appear. We have already seen that the fact as to notice is immaterial as to all parties who actually appear before the master and take part in the proceedings, yet, the better course is to have the report show all notices and how served, though it has been held that, if notice has actually been served upon parties, it is not ground for reversal that the master or commissioner fails to state such fact in his report.³

§ 396. What it must contain — Continued. — The directions in the order of reference may be:

First. To take and report the evidence. In such a case the master acts only as a commissioner to take and return the evidence, and his report should contain nothing else except the evidence and a notation of such objections as are made by counsel.

¹ N. J. Ch. Rule No. 203.

² Code, sec. 4585.

³ *White's Ex'r v. Johnson et al.*, 2 Munf. 285; *Kennedy v. Baylor*, 1 Wash. (Va.) 162. For a full discussion of the subject of notice and what the report should show relative thereto, see *ante*, "Notice of Proceedings in the Master's Office," § 186 *et seq.*

Second. The order of reference may direct the master to take the evidence and report his conclusions thereon, in which event the master should only report his conclusions of both fact and law, making no reference to the testimony except so far as it may be necessary in the statement of his conclusions. In such a case the evidence is not returned except when required by counsel, upon exceptions to his findings of fact.¹

Third. The order of reference may direct the master to take and report the evidence to the court, together with his conclusions thereon. In such a case the master's duties are threefold: 1. To take the evidence. 2. Make his findings of fact. 3. Draw the legal conclusions therefrom. This must all be shown by his report.

In case the master is required to report his conclusions he must first find the facts and embody them in his report to the court, otherwise the court cannot tell whether his conclusions of law are right or wrong.²

Where a matter is referred to a master to examine and report as to particular facts, or as to any matter, it is his duty to draw the conclusions from the evidence before him, and to report the conclusion alone; and it is generally deemed irregular and improper to set forth the evidence in his report without the special direction of the court.³

In stating conclusions the master should set forth in detail the facts found by him, not the mere evidentiary facts, but the ultimate facts required by the order of reference and pleadings.⁴ The master should state the grounds upon which he forms his conclusion. Unless this is done the court, before it can confirm the report, must peruse and consider the contents of all the documents referred to in the report, in order to see whether the master's finding is correct. Under the terms of

¹ In some jurisdictions, as in Illinois, by statute or rule of court, the evidence taken by the master must be returned in every case with his report.

² *Crim v. Post*, 41 W. Va. 397, 406, 23 S. E. 613.

³ *In re Hemiup*, 3 Paige, 305; *Nichols v. Ela*, 124 Mass. 333, 336; *Evans v. Evans*, 2 Cold. (Tenn.) 143, 151.

⁴ *Nims v. Nims*, 20 Fla. 204; *Gage v. Arndt*, 121 Ill. 491, 13 N. E. 138; *Frazier v. Swain*, 86 N. J. Eq. 156; *Lee v. Willook*, 6 Ves. 605; *Meux v. Bell*, 1 Hare, 73, 91, *Champerdowne v. Scott*, 4 Mad. 209; *Marlborough v. Wheat*, 1 Atk. 454; *Bailey v. Myreck*, 52 Me. 132; *McKinney v. Pierce*, 5 Ind. 422.

the 48th order it is the duty of the master to state, "on the face of his report, what depositions, examinations, etc., he has gone upon, and also what are the facts which he has inferred from those matters of evidence, and what is the ultimate conclusion to which he comes."¹ It is sufficient for the master to state the result of his findings, and if the opposite party is dissatisfied with the same it is his duty to except to such items as he considers improperly charged. Upon the overruling of such objection it is the duty of the master, in jurisdictions where he is not required to report the whole evidence, to certify the evidence upon which he bases his conclusions, when requested so to do by the party. This not being done and a mere general objection to the master's findings, it is impossible for the chancellor, if he is willing to encounter the labor, to investigate the matter with any approach to certainty. Such a general objection is very properly overruled.²

§ 397. What it should not contain.— A report, like a judgment, should state results only, and not set forth the evidence, arguments or reasons on which the conclusions are arrived at; and when a master is directed to state his reasons they should be stated briefly.³ All unnecessary prolixity is to be avoided. In the terse language of Mowat, vice-chancellor of the court of chancery of Ontario, "Masters must study brevity in their reports."⁴

Under the old English practice by rules of court, often the chancellors attempted to curb the dispositions of masters to stuff their reports with incompetent and immaterial matter; for instance, the following, entered by Lord Coventry in 1635:

"Whereas Masters of the Courts do sometimes, by way of inducement, fill a leaf or two of the beginning of their reports, and sometimes more, with a long and particular recital of the several points of the orders of reference; they shall forbear such iterations, the same appearing sufficiently in the Order, and without any other repetition than thus, 'according to an Order, or by direction of an Order of such a date,' shall fall directly into the matter of their report, setting down the same

¹ In re Grant, 10 Sim. 573.

³ McCargar v. McKinnon, 15 Gr.

² Alexander v. Alexander, 8 Ala. Ch. 361, 370.
796, 805. See Kirkman v. Vanlier, 7
Ala. 217.

⁴ McCargar v. McKinnon, 17 Grant's
Ch. R. 525.

clearly, but as briefly as they can both for the ease both of the Court and the parties."¹

Another old English order provides that "Their certificates and reports are to be drawn as succinctly as may be (preserving the matter clearly for the judgment of the court), and without recital of the several points of the orders of reference, which do sufficiently appear, by the orders themselves, or the several debates of counsel before them; unless that in case where they are doubtful, they shortly represent to the court the reasons which induce them so to be."²

In regard to unnecessary recitals in reports, United States Equity Rule No. 76 provides: "In the reports made by the master to the court, no part of any state of facts, charge, affidavit, deposition, examination or answer brought in or used before them shall be stated or recited. But such state of facts, charges, affidavits, deposition, examination or answer shall be identified, specified, and referred to, so as to inform the court what state of facts, charges, affidavit, deposition or answer were so brought in or used." It is not necessary that the authority of the master should be set out in the master's report.³

§ 398. What it should not contain — Continued.— The report of the master should be short, concise and to the point. The practice of practically copying the bill, answers, all amendments thereto, and exhibits, of quoting from the evidence, and then setting out at great length the reasons upon which he bases his conclusions, with a view of defending in advance the correctness of his findings, or of making his bill for services in proportion to the length of his report, should be condemned and rebuked by the chancellor. In commenting upon a case where the master "set forth with great fullness the reasons for the various findings and the evidence upon which they rested," adding a copy of the will, the court of chancery of Upper Canada say: "A master's report, like a decree in equity, or the entry of a judgment at law, should, generally speaking, be confined to results, unless the master is directed by the decree to state his reasons, and then he should do so briefly."⁴ The

¹ Beames' Orders in Ch., pp. 81, 82.

² Shaw v. Wise, 166 Mass. 433, 44

³ Beames' Orders in Ch., pp. 208, 209; Curs. Canc. 429; Pract. Reg. 877 (Wyatt's ed.).

N. E. 345.

⁴ McCragar v. McKinnon, 15 Grant's Ch. R. 361, 370.

practice of stuffing reports with lengthy arguments and reasoning in support of the master's findings is frequently condemned by the chancellor.¹ In a New Jersey case the chancellor criticised the master for arguing the case on the merits as follows: "The course adopted by the master of arguing the whole case upon its merits, as has been done in this report, and that too at great length, is novel, and will not, it is hoped, be considered as a precedent to be followed. The province of the master is to report facts, and not arguments, for the information of the court."²

§ 399. **Must be methodical.**— A proper report made by the master should not only contain everything required of him by the order of reference, with nothing that is immaterial, but the matters reported must be methodically stated and arranged. It has been said that "artificially drawn, a report should first recite the issue; secondly, determine the facts to be found from the evidence; thirdly, the law arising upon the findings; and, finally, the form of the decree."³ The master should state clearly all the facts found by him so that they will be intelligible without reference to the testimony.⁴ The frame of a report is as important as its contents; for a report may contain everything called for by the order of reference, and yet its statements may be so unmethodical, and its arrangements so unsystematical, and its construction so irregular and chaotic that no decree can be predicated upon it without rearranging and restating its contents. As every order of reference should not only specify, in a separate paragraph, each particular matter to be reported on, but should also give each item of the reference in its proper logical order, or legal sequence, and consecutively numbered; so a report should not only respond fully and directly to each of the particular matters of reference, but should also respond to them in the order in which they

¹ Jackson v. Jackson, 2 Green's Ch. (N. J. Eq.) 96; Evans v. Evans, 2 Cold. 143; Green v. Lanier, 5 Heisk. 662; Topliff v. Jackson, 12 Gray, 565, 569; Herrick v. Belknap, 27 Vt. 673. But see Frazier v. Swain, 36 N. J. Eq. 156. For a clear violation of the rule that the master should not make long re-

citals of the previous orders of the court see the master's report in Mason v. Crosby, 3 Woodh. & M. 258, Fed. Cas. 9,236.

² Jackson v. Jackson's Ex'rs, 3 N. J. Eq. 96, 114.

³ Agnew v. Whitney, 11 Phil. 298.

⁴ Herrick v. Belknap, 27 Vt. 673.

appear in the reference, and should never put under one head what properly belongs to another head of the reference.¹

The supreme court of Pennsylvania condemned a master's report for lack of method as follows:

The master has not found the facts with that distinctness which is desirable, but following a practice which seems quite prevalent, has blended part of his findings with his opinion, and in some instances assumed the existence of certain facts to be known and undisputed, instead of saying explicitly that he found them from the evidence. It may not be amiss to call the attention of the legal profession to the importance of a clear and concise finding of the material facts in such cases as are referred to masters and auditors, unburdened by recitals of or references to or comments upon the evidence. This should be followed by an opinion upon the facts found, with citation of authorities. But such opinion to be helpful to the court should be as brief as the subject will admit.²

§ 400. **Must be methodical — Continued.**— Sometimes this matter is regulated by statute or by rule of court; for example, in Georgia it is provided by the Code, sections 4587, 4588, that "after hearing the evidence and argument, the auditor shall file the evidence and a report, in which he shall clearly and separately state all rulings made by him, classify and state his findings, and report his conclusions upon the law and facts," and that "upon filing his report, he shall give both parties or their counsel written notice thereof." A methodical arrangement of matters stated in the report requires that each fact or finding should be clearly and definitely stated. The master must report on each and every matter required of him by the order of reference, and such report must be positive, definite and correct; not inferential, hypothetical, or in the alternative as to any matters. The court wants the master's findings as to the facts, and his positive and affirmative conclusions as to matters of judgment or opinion. A report giving alternative states of facts, or alternative conclusions, is no report at all, and should be set aside on motion. The facts should be set forth with such precision, and the duty imposed upon the mas-

¹ Gibson, Suits in Ch., § 591.

² Mortland v. Mortland, 151 Pa. St. 593, 597, 25 Atl. 150.

ter performed with such fullness and completeness, that the court will have no difficulty in basing a decree as to every matter specified in the order of reference.¹

The following are examples of a master's report held to be bad for uncertainty:

The master should not be content with the slovenly statement that he finds the allegations of the bill to be true, but he should state the specific facts proven.² The statement that he finds the allegations of the bill to be proven is a conclusion rather than the statement of a fact. Under such a statement the court cannot know but that the master is mistaken as to what are the material allegations of the bill. A report that most of the money which came from the sale of a place by a plaintiff's son, and to which plaintiff was entitled, went into a specified mortgage which plaintiff seeks to have revived and foreclosed, but that he cannot tell just how much, is not sufficiently definite to found a decree upon,³ but when the master's report is considered in connection with the respective accounts of the party, and all that were allowed and rejected can be ascertained, and the report is so plain that it can be understood without trouble, it is sufficient.⁴

§ 401. In a case of accounting.—The master's report in stating an account should show in what manner he arrived at his conclusions so as to enable the court to ascertain whether his method was right or wrong.⁵ In such a case the master's report must show the items of the account as stated by him. The report must state facts and not general results or conclusions.⁶ His report must show specifically what items are allowed and what disallowed.⁷ The account must be stated in this manner so that the parties, if dissatisfied with the master's allowance or disallowance of any particular item, can point out the same by exceptions.⁸ This may be done by stating the

¹ Gibson, Suits in Ch., § 590.

² Campbell v. Harmon, 43 Ill. 18, 20.

³ Bourne v. Bourne, 69 Vt. 251, 37 Atl. 1049.

⁴ Snell v. De Land, 136 Ill. 533, 538, 27 N. E. 183.

⁵ Frazier v. Swain, 36 N. J. Eq. 156; Moore v. Huntington, 17 Wall. 417; Robertson v. Baker, 11 Fla. 192; June

v. Myers, 12 Fla. 310. See further on method of stating the account in a master's report; *ante*, § 302.

⁶ Craig v. McKinney, 72 Ill. 305; Whitehead v. Perie, 15 Tex. 7.

⁷ Snell v. De Land, 138 Ill. 55, 61, 27 N. E. 183; Gage v. Arndt, 121 Ill. 491, 496, 18 N. E. 138.

⁸ Reed v. Jones, 15 Wis. 40; Morris

items allowed or rejected in the body of his report, and referring to schedules filed therewith.¹ These schedules should be annexed to the report and filed with the same,² and the accounts so exhibited that the court may see the correctness of the master's action thereon and his inferences.³

The supreme court of Tennessee, in the leading case on the subject in that state, say: "While the report of the master should not, upon the one hand, contain, as has sometimes occurred, copies of the depositions at length, it should not, upon the other, be a mere skeleton, presenting nothing more than a grim array of figures. Each of the items in it should be numbered, and where these items rest upon accounts, receipts, or other vouchers, they should be numbered correspondingly; and where they are supported by depositions, the pages of the depositions should be referred to; and where any question arises as to which the master deems it his duty to report, or as to which he is unable to report, he should state the facts briefly, and refer to the pages of the depositions, or documentary evidence, upon which he relies."⁴ The master, under the United States equity practice rules, is required to identify every paper brought in before him, so as to inform the court concerning the pleadings and evidence which he considered in reaching the conclusions embodied in his report;⁵ and, where the items are numerous and the evidence voluminous, the master should briefly cite or refer to evidence upon which he predicates his report.⁶

In short, in all cases of accounting the master should state his account in detail, by items, times, rates, etc., and show the items claimed and disallowed, as well as items allowed. Then, on exception, the attention of the court need only be directed to the items, times, rates, etc., to which exception is made. It is not enough in such cases, and under a specific order of reference, to report the testimony *en masse*, and the amounts in

v. Peckham, 51 Conn. 128; Patterson v. Kellogg, 53 Conn. 38, 22 Atl. 1096; Ransom v. Davis, 18 How. 295.

¹ Craig v. McKinney, 72 Ill. 305, 314; Snell v. De Land, 136 Ill. 533, 27 N. E. 707.

² Smith v. Smith, 2 Dick. 789; 2 Barbour, Ch. Pr. 549.

³ Jeffreys v. Yarborough, 2 Hawks, 307.

⁴ Green v. Lanier, 61 Tenn. (5 Heisk.) 662, 671.

⁵ U. S. Eq. Rule 76. See *In re Thomas*, 85 Fed. Rep. 387, 389.

⁶ Stull v. Goode, 66 Tenn. (10 Heisk.) 58, 62.

the aggregate, with no reference to items claimed and disallowed. The supreme court of Illinois say that the very object of a reference to state an account is defeated by such a course, and that, instead of aiding the court, it is well calculated to produce doubt and uncertainty.¹

§ 402. Its form.—A master's report, where the case is at all complicated, should be divided into five parts:

First. It should give a clear and succinct history of the case as gathered from the pleadings and the evidence. The issues, both of law and fact, should be herein recited and defined. If by agreement the parties have let any matter put at issue by the pleadings drop out of the case, this should be stated. In brief, everything necessary to a full and proper understanding of the controversy should be set forth.

Second. The findings of facts should next follow. These ought to appear in separate, numbered paragraphs, each of which should relate to a particular issue raised by the pleadings. They should be clear, distinct and adequate, and without admixture of comment or argument. As a rule the findings of fact should cover every issue of fact raised by the pleadings. An issue deemed immaterial or irrelevant by the master may not be so considered by the chancellor or by the higher court. The master never can enlarge, nor, usually, without the consent of both sides, narrow or ignore the issues formally and deliberately framed by the parties and referred to him by the court. It must be kept in mind that the issues are limited and defined by the pleadings, which should be carefully examined to ascertain just what is admitted and what denied. The matters in dispute, whether of law or fact, are fully set out and defined by the pleadings before the case goes to the master, unless it is referred to him for some limited and special purpose.

Third. The conclusions of law come next in order. These should also be full and adequate, embracing and covering every question involved in the case, and should be contained in brief, numbered paragraphs, each one relating as far as possible to a different subject. They should not have tacked to them arguments or citations of authorities.

¹ Gage v. Arndt, 121 Ill. 491, 496, 13 N. E. 188, citing Brookman v. Aulger, 12 Ill. 277, and Craig v. McKinney, 72 Ill. 805.

Fourth. The form of decree recommended should be set forth.

Fifth. Here the master should, if it is proper so to do, sustain all that has gone before, by arguments, illustrations, and authorities.¹

§ 403. Its form — Continued. — Following these suggestions, yet with a little more minuteness, the following skeleton form of a report is given, the headings being divided as follows:

First. Venue and court.

Second. Title of case and its numbers.

Third. Address.

Fourth. Parties present in person and by counsel.

Fifth. Recital of proceedings in the master's office, the taking of testimony and other matters proper to be stated for the information of the court.

Sixth. Findings of fact.

Seventh. Conclusions of law.

Eighth. Recommendation of relief to be granted.

Following these suggestions, a skeleton report is given below, which, of course, must be varied to suit the facts and circumstances of each particular case.

Skeleton Form of Master's Report.

STATE OF ILLINOIS, }
County of Cook. } ss.

In the Circuit Court of Cook
County.

Henry H. Brown	}	In Chancery.
v.		Gen. No. —.
Eugene Wilson, Mary A.		Term No. —.
Wilson and Charles T.		
Smith, Trustee.		

*To the Honorable Judges of the Circuit Court of Cook County,
in Chancery sitting:*

I, Thomas Taylor, Jr., master in chancery of said court, do respectfully report that, pursuant to an order of reference heretofore made and entered in said cause by said court, I was, on November 11, A. D. 1901, attended at my office in the city of Chicago, in said Cook county, by George H. Taylor, Esq., solicitor for complainant, and Hiram T. Warren, Esq., solicitor for the defendants.

I further report that the said solicitor of the complainant

These admirable directions to the master as to the form of his report in a complicated case, reference being made to him to report the facts and his conclusions thereon, are taken substantially from the opinion of Judge Wickham in the case of Gas Co. v. Gas Co., 7 C. C. (Pa.) 277, 24 W. N. C. 573, 575. See Brewster's Eq. Pr. in Pa., § 6030. See also Agnew v. Whitney, 2 W. N. C. 474.

offered in evidence the several papers and instruments in writing herein afterward described, and caused to be sworn on behalf of the complainant the following witnesses, John Smucker, Henry T. Hume and Robert A. Belknap, who testified as stated in the stenographer's report of evidence hereto attached, duly certified and made a part of this report; and I further report that the solicitor for the defendants offered in evidence the several papers and instruments in writing herein afterward described, and caused to be sworn on behalf of said defendants the following witnesses, George A. Barnes and William T. Berry, who also testified as stated in the stenographer's report of evidence hereto attached, as above stated.

From all the evidence introduced as aforesaid, I make the following findings of fact, to wit:

I find that on the 8th day of August A. D. 1894, the defendant, Eugene Wilson, made his certain promissory note in writing for the sum of sixteen hundred dollars (\$1,600), payable to the order of himself and by him indorsed, being due and payable in three years after date thereof, etc.

I further find that, upon the same day, to secure payment of the said promissory note, with interest thereon, according to the tenor and effect thereof, the said Eugene Wilson and Mary A. Wilson executed and delivered to one Charles T. Smith, one of the defendants above named, as trustee, a trust deed upon the described real estate, to wit: Lot (39), block (fifteen), etc. Exhibit 1.

I further find that complainant, Henry H. Brown, is now the legal holder and owner of said principal note and interest notes, Exhibits 2, 3, and 4.

That no part of said principal note and no part of said interest notes has ever been paid.

That from the evidence I further find that the sum of \$150 is a usual, customary and reasonable fee for the services rendered and to be rendered in this cause by the solicitor for the complainant.

I further find that the complainant, after the execution of said notes and trust deed, paid the sum of \$174 as taxes for the real estate aforesaid.

I therefore further find and state the account of the amounts now due said complainant, Henry H. Brown, under the terms of said principal note, interest notes and trust deed, as follows:

Principal note, Exhibit 2.....	\$1,600.00	
Interest from 8th day of August, A. D. 1897, to date.	456.00	
Interest note, Exhibit 3.....	43.00	
Interest on same, 5 years, 3 months	13.54½	
Interest note, Exhibit 4 ..	43.00	
Interest on same, 4 years, 9 months.....	12.25½	
Taxes paid by complainant.....	174.00	
		<hr/>
		\$2,841.80
Solicitor's fees.....		150.00
		<hr/>
		\$2,491.80

As applicable to the foregoing facts I find the following conclusions of law, to wit:

First. I find that said defendant, Henry H. Brown, as the legal holder of said promissory note, is entitled to recover of and from the said Eugene Wilson, the maker thereof and principal defendant herein, the amount of said promissory note, with interest thereon at the rate of six per cent per annum from the date thereof, etc.

And I further find that the trust deed aforesaid, made and executed to secure the payment of said promissory note, is a valid, subsisting, first lien upon the real estate above described; and I further find that by joining with her husband in the execution of the trust deed aforesaid, the said Mary A. Wilson, wife of the said Eugene Wilson, waived, released and conveyed all her dower interest in said real estate, etc.

I therefore further find that all the material allegations of the bill of complaint in this cause are proven and true, and recommend that a decree be entered in accordance with the allegations of said bill of complaint and the findings herein before set out, etc.

All of which is respectfully submitted, this eighth day of May, A. D. 1902.

THOMAS TAYLOR, JR.,
Master in Chancery, Circuit Court
of Cook County, Illinois.

Master's fee for report, \$75.

Master's fee for evidence, \$25.

No objections filed June 4, 1902.

THOMAS TAYLOR, JR.,
Master in Chancery.

Evidence.

Pursuant to notice, the parties to this cause appeared before the master in chancery, Thomas Taylor, Jr., on the eleventh day of November, A. D. 1903, at ten o'clock A. M., and the following proceedings were held:

Present: George H. Taylor, Solicitor for complainant, and Hiram T. Warren, Solicitor for defendants.

John Smucker, called as a witness for complainant, being first duly sworn, testified as follows:

Direct Examination by Mr. Taylor.

Q. What is your name? A. John Smucker.

Q. Where do you live? A. In the city of Chicago, etc.

[Here insert whole of stenographer's report, showing all the evidence and proceedings upon taking of same, including examination of witnesses, cross-examinations, motions made by counsel, the rulings of the master thereon, and the introduction of documentary evidence, referring to the latter, when not

"read into the record," by appropriate letters or figures, as "Exhibits A," "B," etc.]

I, Thomas Taylor, Jr., master in chancery, hereby certify that the foregoing certificate of evidence contains all the evidence offered by either party upon the hearing before me, and I further certify that I was personally present at the examination of each and every witness named therein; that the same was taken in shorthand by Joseph A. Baker, a stenographer selected by me,¹ who, at my request, reproduced the same in typewriting as above; and I further certify that I believe the same accurately states the evidence given; and I further certify that the exhibits named therein were marked by me for identification and permitted to be retained for better security by the solicitors who offered the same.²

Dated this 8th day of May, A. D. 1902.

THOMAS TAYLOR, JR., Master in Chancery.

The foregoing *certificate of evidence* can be easily modified so as to apply to a case where the master is required to return only such portions of the evidence as apply to particular findings called in question by the dissatisfied party.

§ 404. Its form — Continued.— It must be understood that the form of the master's report given in the preceding section is for the purpose of showing the several parts or divisions, and that, in the foreclosure of a single mortgage, there being no other questions involved, it would require but little variation; yet ordinarily it will be found necessary to vary it according to the facts and circumstances of each particular case; for example, in the case in which I have followed the master in this form,³ the bill alleged that the trustee, after selling the note to the complainant, fraudulently obtained possession of it, under the pretense that he wanted it to threaten the maker with a foreclosure proceeding in order to collect the same for the complainant; that the real object was to get the note in order to offer it in evidence in a foreclosure proceeding then pending and standing upon reference to a master; that said foreclosure proceeding was begun in the name of a co-conspirator and without the knowledge or consent of the actual owner and holder of said note; that the said note was offered in evidence, a master's report obtained, a decree of sale obtained,

¹ In New Jersey a rule of court requires the stenographer to be sworn, and the master's certificate should state this fact. Ch. Rule 44.

² As to the necessity and form of this certificate see *pcst*, §§ 417, 471.

³ Gen. No. 173,496, Circuit Court, Cook County, Illinois.

followed by a sale of the premises, and that the trustee caused the pretended complainant to assign the certificate of purchase to an innocent third party after returning the note to the actual owner thereof.

The master found all these allegations to be true and recommended that the whole of the fraudulent foreclosure proceedings, including the certificate of sale, be decreed to be void and of no effect, which was accordingly done.

§ 405. Its form — Continued.— The following "skeleton report," adapted from the case (118 Fed. R. 720) the title of which is given, will serve as a guide in the preparation of masters' reports in the circuit courts of the United States. Of course, like all other forms given in this work, it must be varied to suit the facts and circumstances of the particular case.

Master's Report.

In the Circuit Court of the United States, Northern District
of Illinois, Northern Division.

Joshua C. Sanders	}	Amended bill.
v.		
The Village of Riverside.	}	No. 21,878.
v.		
The Village of Riverside	}	Cross-bill.
v.		
Joshua C. Sanders.		

To the Honorable Judges of said Court:

The undersigned, master in chancery of said court, to whom, by an order heretofore entered, the above entitled cause was referred to take further testimony therein, and to report the same with the testimony already taken to the court, together with his findings of fact and of law, respectfully reports:

No further testimony was offered on behalf of either party to the suit; that he has considered the pleadings in the said cause, and the testimony that had been taken therein, and having heard the arguments of counsel, and examined briefs filed on the part of complainant and defendant, the master finds as follows:

I.

RÉSUMÉ OF PLEADINGS.

1. The original amended bill.

The original amended bill alleges that complainant is a citizen and resident of the state of New York, and that defendant is a municipal corporation in the county of Cook, and state of Illinois; that complainant is and for sixteen years last

past has been seized in fee simple of certain lands situated in Riverside, in the county of Cook, and state of Illinois, to wit:
[Here set out briefly allegations of amended bill.]

2. The cross-bill of the defendant.

[Here set out briefly the allegations of the cross-bill.]

3. The answer to the original amended bill.

[Here set out briefly the allegations of the answer.]

4. The answer to the cross-bill.

[Here set out briefly the allegations of the answer.]

5. Replications.

Replications were duly filed to each of the foregoing answers, so that the issues were made up on the original bill, answer thereto, and replication, and cross-bill, answer, and replication to same. Reduced to its lowest terms, the issue in this controversy is this:

Complainant in original and defendant in cross-bill claims to be the owner in fee simple of two strips of land about thirty feet in width, lying one on the north and the other on the south side of the right of way of the Chicago, Burlington & Quincy Railroad Company, beginning at the east line of section thirty-six (36), township thirty-nine (39), north, range twelve (12), and running west forty-seven hundred (4,700) feet, the same being in the village of Riverside, Cook county, Illinois. Each insists that the claim of the other is a cloud upon his title and asks the court to remove the same.

II.

FINDINGS OF FACT.

[Here set out findings of fact, numbered consecutively.]

III.

FINDINGS OF LAW.

[Set out findings of law, numbered in same way.]

IV.

RELIEF RECOMMENDED.

The said real estate having been abandoned and not used for the purpose for which the offer of dedication was made, the title thereto reverted to the Riverside Improvement Company, and having now by mesne conveyances been vested in the complainant in the original bill, he is entitled to a decree establishing his title thereto; that as to the one-half of said strips adjacent to the railroad right of way, there has been a valid common-law dedication thereof, and that the cross-complainant is entitled to a decree in its favor establishing such

dedication, if such relief is proper under the allegations of the answer and cross-bill, and the prayer for general relief in said cross-bill, or if the court shall deem it proper at this stage of the proceedings to permit the cross-bill to be amended in this regard.

Respectfully submitted,

E. B. SHERMAN,

Master in Chancery, United States Circuit Court,
Northern Division of Illinois.

Chicago, September 20, 1900.

§ 406. Its form — Continued.— A form of report is here given in case of a reference to a master upon exceptions taken to an answer upon the ground of insufficiency, which report the master will vary to suit the case in hand.

Report Upon Exceptions to Answer.

STATE OF ILLINOIS,	{	ss.	In the Circuit Court of Cook County. To the September term thereof, A. D. 1903.
County of Cook.			

John L. Barnes	{	Gen. No. 204,768. Term No. 6,426. In Chancery.
v.		
George W. Benson and Mary A. Benson.		

To the Honorable Judges of said Court, in Chancery sitting:

In pursuance of an order of said court, made on the 22d day of August, A. D. 1903, whereby it is referred to me, one of the masters of said court, to look into the complainant's bill of complaint, the answer of the defendants thereto, and the exceptions taken by the complainant to said answer, and report to said court with all convenient speed, whether said exceptions are well taken or not:

I, Horatio L. Wait, one of the masters of said court, do respectfully certify and report that I have been attended by the counsel of the respective parties, and have looked into said bill and answer, and the exceptions taken thereto, and have heard the arguments of the respective counsel in relation to said exceptions; and, having duly considered said bill, answer, exceptions, and arguments, do report, that the first, fourth, sixth, and seventh exceptions to said answer are well taken; and that the second, third, fifth, eighth, and ninth exceptions are not well taken, and, as to such exceptions so held to be well taken, the said answer is insufficient.

All of which is respectfully submitted, this 22d day of September, A. D. 1903.

HORATIO L. WAIT,
Master in Chancery.¹

¹ Adapted from 3 Hoffman's Ch. Pr. No. 104, and Hoffman's Masters in Chancery, p. 400.

§ 407. *Its form — Continued.*—Sometimes during the progress of the hearing, as we have already seen, it becomes necessary to make a special report or certificate for the information of the court. A form of such special report or certificate is here given, in a case where a witness, called on the part of the complainant, declined to answer a question on cross-examination. This form will serve as a guide, and, of course, must be varied to suit the circumstances of each particular case.

Special Report or Certificate.

STATE OF ILLINOIS, }	ss. In the Circuit Court of Cook County. To the July term thereof, 1902.
County of Cook. }	
Henry A. Barnard }	In Chancery.
Charles W. Terry. }	

Pursuant to adjournment the parties assembled at the master's office at Room 1310, No. 100 Washington street, in the city of Chicago, in the county aforesaid, on the 24th day of June, A. D. 1902, for the purpose of taking further testimony to be produced on the part of the complainant.

Present: Henry A. Barnard, complainant, and James T. Brown, his solicitor, Chas. W. Terry, defendant, and Joseph N. Jackson, his solicitor, and Andrew L. Jones, a witness on part of the complainant.

Andrew L. Jones was duly sworn and examined on behalf of the complainant, and upon certain questions being put to him, the said witness, in cross-examination by Joseph N. Jackson, the defendant's solicitor, the said witness declined and refused to answer, on ground of privilege.

Whereupon the master was requested to certify to the court, by interlocutory report, the examination of said witness for the purpose of securing the opinion and order of the court as to the propriety of the witness declining and refusing to answer the questions propounded to him. A correct copy of said deposition is hereto attached. All of which is hereby certified.

GEORGE MILLS ROGERS,
Master in Chancery.

§ 408. *Relief to be recommended.*—The relief to be recommended by the master must be based upon his conclusions of law, and these again must be based upon his findings of facts — that is, the issues submitted to him by the order of reference and the pleadings. The master will frequently find that the relief prayed for in the pleadings is not warranted by the evidence, and, just as frequently, probably he will find that the relief justified by the proof cannot be granted, because of a

want of proper allegations in the pleadings. It is a fundamental principle, both at law and in equity, that no relief can be had unless the allegations of the pleading justify it. A want of allegation to sustain the relief sought is as fatal as the lack of proof to show the party entitled to such relief. If parties are not bound by their pleadings, the very object of having pleadings would be defeated. Parties would be misled, and there would be a lack of that certainty and definiteness which is necessary to correct legal proceedings and to the attainment of justice.¹

The chief object of written pleadings is to distinctly inform the adverse party of the facts relied on for a recovery or a defense, so that he may admit or deny them, or question their legal sufficiency by a demurrer, exceptions, or otherwise, as he may be advised by his counsel, and also to inform the court of the real points of difference between the parties to the suit, so as to enable it to intelligently pass upon and determine their respective rights. But if parties are not held bound by their pleadings, it is clear the very object of them would not only be defeated, but they would be used by unscrupulous litigants for the express purpose of misleading their adversary, and neither the court nor the parties could ever know to a certainty the point of difference till all the evidence was in, and hence no one could intelligently prepare for trial. In conformity, therefore, with this rule, it has been often held by the courts, that if a complainant fails to prove the case made by his bill he will not be entitled to recover, although the facts actually proved by him would have entitled him to relief had his bill been framed on a different theory.² The relief granted, however just and equitable, must be consistent with the pleadings and proofs. For example, under a bill charging that a contract was obtained by fraud and praying for a rescission, the court cannot decree a specific performance. The allegations of the pleadings, as well as the proofs, must be consistent with the relief granted.³ No matter what defense may be shown

¹ *Quinn v. McMahan*, 40 Ill. App. 598, 600; *Walker v. Ray*, 111 Ill. 315. *rill*, 55 Ill. 52; *Tiernan v. Granger*, 65 Ill. 351.

² *Kellogg v. Moore*, 97 Ill. 282, 287, citing *Moffett v. Clements*, 1 Scam. 384; *White v. Morrison*, 11 Ill. 361; *Rowan v. Bowles*, 21 Ill. 17; *Tuck v. Downing*, 76 Ill. 71; *Taylor v. Mer-* ³ *Clinnin v. Raugh*, 88 Ill. App. 371; *Brockhausen v. Bockland*, 137 Ill. 547, 552, 27 N. E. 458; *McKay v. Bissett*, 5 Gilm. (Ill.) 499, 505; *Kellogg v. Moore*, 97 Ill. 282, 287.

by the evidence, it will be unavailing unless such defense is set up in the answer.¹

A party is not permitted to make out one case by his pleadings and a different one by his proof, but the proof must correspond with the allegations he has made, and not be inconsistent therewith. He must stand or fall with the case made in his bill.² Where the evidence makes a case different from that alleged in the bill no recovery can be had.³ The rule may be tersely stated as follows: A party cannot make one case by his bill and another by his proofs.⁴

The master, in forming his conclusions, must never forget that in equity proceedings the proof and allegations must agree. A party can no more succeed upon a case proved, but not alleged, than upon a case alleged but not proved.⁵ The master must keep in mind that if he is prevented from recommending, in such a case, relief otherwise warranted, the responsibility rests with the parties and not upon him. If a party sees that he cannot obtain the relief desired, under his bill as originally framed, he should at the earliest moment after such discovery is made apply for and obtain leave to amend. If he fails to do this and the master or court refuse to grant the relief sought, or the relief desired be granted and the upper court reverses the action of the lower court, he can have no ground to complain.⁶ While the rule is that the

¹ *Crone v. Crone*, 180 Ill. 599, 54 N. E. 605.

² *White v. Morrison*, 11 Ill. 361, 366; *McKay v. Bissett*, 5 Gilm. 499; *Eaton v. Sanders*, 43 Ill. 435.

³ *Dorn v. Geuder*, 171 Ill. 362, 369, 49 N. E. 492 and cases cited.

⁴ *Tuck v. Downing*, 76 Ill. 71; *Morris v. Tillson*, 81 Ill. 607; *Berger v. Peterson*, 78 Ill. 638; *Rowan v. Bowles*, 21 Ill. 17; *Chaffin v. Heirs of Kimball*, 23 Ill. 36; *Wise v. Twiss*, 54 Ill. 301; *Furlong v. Riley*, 103 Ill. 628; *Kerfoot v. Billings*, 160 Ill. 563, 43 N. E. 804; *Day v. New Lots*, 107 N. Y. 148; *Romeyn v. Sickles*, 108 N. Y. 650; *Wood v. Carpenter*, 101 U. S. 140, 141; *Hammond v. Wallace*, 85 Cal. 532, 24 Pac. 837; *Wilson v. Wilson*, 6 Mich. 9; *Harwood v. Under-*

wood, 28 id. 427; *Ford v. Loomis*, 33 id. 121; *Peckham v. Buffam*, 11 id. 529; *Dunn v. Dunn*, 11 id. 248; *Wurcherer v. Hewett*, 10 id. 453; *Covell v. Cole*, 16 id. 223; *Boyle v. Laird*, 2 Wis. 431; *Taylor v. Merrill*, 55 Ill. 52; *Tiernan v. Granger*, 65 id. 351; *Warner v. Whitaker*, 6 Mich. 183, 72 Am. Dec. 65.

⁵ *Foster v. Goddard*, 1 Black (U. S.), 506, 518; *Simms v. Guthrie*, 9 Cranch, 19; *Harrison v. Nixon*, 9 Pet. 483, 503; *Boone v. Chiles*, 10 Pet. 177; *Tripp v. Vincent*, 3 Barb. Ch. 618; *Bank of United States v. Schultz*, 3 Ohio, 61; *Sadler v. Grover*, 5 Dana, 551; *Breckenridge v. Ormsby*, 1 J. J. Marsh. 237, 19 Am. Dec. 71.

⁶ See "Amendment of Pleadings," ante, §§ 305-311.

allegata et probata must agree, it has no application to immaterial issues. "A party is not bound to prove matters which are mere surplusage. If the proof does not correspond with such matters the variance is not material."¹

§ 409. Relief to be recommended — Continued.— Occasionally there will come into the master's office a bill with a double aspect. Chancellor Walworth says that a proper case for such a bill "is where the complainant is in doubt whether he is entitled to one kind of relief or another, upon the facts of his case, as stated in the bill. In such a case he may frame his prayer in the alternative, so that if the court is against him as to one kind of relief prayed for, he may still be enabled to obtain any other relief to which he is entitled under the other part of the alternative prayer. So, also, where the complainant is entitled to relief of some kind, under the general facts stated in his bill, if the nature of the relief to which he is entitled depends upon the existence or non-existence of a particular fact, or circumstance, which is not within his knowledge, but which is known to the defendant, he may allege his ignorance as to such fact, and call for a discovery thereof. And in such a case he may also frame his prayer in the alternative, so as to obtain the proper relief, according as the fact may appear at the hearing of the cause."²

In such a bill, however, the relief prayed for must always be consistent with the case made by the bill. For example, under a positive allegation that no valid will was ever made, a prayer for special relief, based on the theory that the court might be satisfied that there was a valid will, is wholly inconsistent with the case made by the bill.³ If the complainant is in doubt whether the facts stated in the bill entitle him to the specific relief prayed for, the prayer should be in the disjunctive; so, too, where the facts stated in the bill may entitle the complainant to one kind of relief or another, but not to both, the prayer should be in the disjunctive, otherwise the last part of the prayer will not be considered as in the alternative,

¹ *Pennsylvania Co. v. Conlan*, 101 Ill. 98, 102; *West v. Cole*, 12 Mod. 127; *Gibbs v. Cannon*, 9 S. & R. 198, 11 Am. Dec. 699; *Little v. Blint*, 16 Pick. 865; 3 *Robinson's Pr.* 562; 1 *Chitty's Pl.* (7th Am. ed.) 262, 263.

² *Lloyd v. Brewster*, 4 Paige, 537, 540, 541, 27 Am. Dec. 88.

³ *Colton v. Ross*, 3 Paige, 396, 32 Am. Dec. 648.

but as in addition to the prayer contained in the first part.¹ Undoubtedly a complainant may, in certain cases, frame his bill with a double aspect, where it is doubtful what relief he may be entitled to on the facts, or where the nature of the relief to which he is entitled depends upon the existence or non-existence of facts or circumstances not within his knowledge, but known to the defendant.² And in such cases the prayer may be in the alternative, so that if the chancellor decides against the complainant in one view he may grant relief under the other.³ And this is true though the different aspects presented be not consistent each with the other, if each alternative case made by the allegations of the bill entitles the complainant to the relief asked by the prayer.⁴ But he cannot pray a particular relief which is entirely different from his case as made by his bill.⁵ Nor can he seek alternative relief where there is no ignorance as to facts, when the different parts of his bill are inconsistent with each other.⁶

§ 410. Relief to be recommended — Continued.—In many cases the master will find it to be his duty to recommend a denial of the relief prayed for on other grounds than that of failure of the proof to correspond with the allegations of the pleadings. For example, a party's proof may fully establish his right to a recovery, provided he had sooner appealed to the court for remedy. That is, his proof may show a good cause of action, yet he may have slept upon his rights until his remedy is completely barred. To render this rule applicable two things are necessary:

First. A sufficient lapse of time to require the court to place the plaintiff's claim in the class of "stale demands."

¹ Id. As to alternative prayer, see 1 Dan. Ch. Pr. 384 and cases cited in notes. See 1 Johns. 559; 13 Ves. Jur. 119; 1 Johns. Ch. 117; 2 Young & Jarvis, 33; 2 Peters, 595; 1 Dan. Ch. Pr. 377.

² Collins v. Knight, 8 Tenn. Ch. 188, 188.

³ Henderson v. Harness, 184 Ill. 520, 523; Varick v. Smith, 5 Paige's Ch. 187, 28 Am. Dec. 417; Rives v. Walthal, 33 Ala. 329; Story's Eq. Pl. 42.

⁴ Henderson v. Harness, 184 Ill. 520, 523; Varick v. Smith, 5 Paige's Ch. 187, 28 Am. Dec. 417; Story's Eq. Pl., sec. 254.

⁵ Collins v. Knight, 8 Tenn. Ch. 188, 188.

⁶ Lloyd v. Brewster, 4 Paige, 587, 27 Am. Dec. 88; Colton v. Ross, 2 Paige, 397, 22 Am. Dec. 648; Coleman v. Pinkard, 2 Humph. (Tenn.) 185, 190; Collins v. Knight, 8 Tenn. Ch. 188, 188.

Second. The plaintiff must have had knowledge of the facts, or his ignorance must be the result of fault on his part.

The supreme court of Illinois in a recent case¹ said: The law is well settled in this and other states that a court of equity will refuse its aid to stale demands where the party has slept upon his rights or acquiesced for a great length of time, and shows no excuse for his delay in asserting his rights.² Where, however, a party has been injured by fraud, and remains in ignorance of the fraud without any fault on his part, and a bill has been filed for relief on account of the fraud, laches will not, as a general rule, defeat a recovery. The obligation to institute proceedings can only arise upon a discovery of the fraud.³

The rule is accurately stated by the supreme court of the United States as follows: "Equity, in the exercise of its inherent power to do justice between the parties, will, when justice demands it, refuse relief, even if the time elapsed without suit is less than that prescribed by the statute of limitations."⁴ There is no ironclad rule in this regard, but "as observed in *Halstead v. Grinnan*,⁵ the length of time during which the party neglects the assertion of his rights, which must pass in order to show laches, varies with the peculiar circumstances of each case, and is not, like the matter of limitations, subject to an arbitrary rule. It is an equitable defense, controlled by equitable considerations, and the lapse of time must be so great, and the relation of the defendant to the rights such, that it would be inequitable to allow the plaintiff to now assert them."⁶ Where the delay of a party is occasioned by a desire on his part to see whether developments, undertaken by those in possession, will be successful or otherwise, he is justly chargeable with bad faith, which courts of chancery always aim to discourage.⁷ Hence it is a maxim of the law that a party will

¹ *Wilson v. Augur*, 176 Ill. 561, 571, 52 N. E. 280.

² *Castner v. Walrod*, 83 Ill. 171; *Dempster v. West*, 69 id. 613.

³ 18 Am. & Eng. Ency. of Law, 683; *Middaugh v. Fox*, 135 Ill. 344, 25 N. E. 584; *Greenman v. Greenman*, 107 id. 404; *Jones v. Lloyd*, 117 id. 597, 7 N. E. 119.

⁴ *Alsop v. Riker*, 155 U. S. 448, 461, 15 Sup. Ct. R. 162. See also *Har-*

wood v. Railroad Co., 17 Wall. 78; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587, 592; *Hayward v. National Bank*, 96 U. S. 611, 616; *Richards v. Mackall*, 124 U. S. 183, 187, 8 Sup. Ct. R. 437; *Hammond v. Hopkins*, 143 U. S. 224, 250, 12 Sup. Ct. R. 418.

⁵ 152 U. S. 412, 416.

⁶ *Alsop v. Riker*, 155 U. S. 448, 461, 15 Sup. Ct. R. 162.

⁷ *Curtis v. Lakin*, 36 C. C. A. 222, 94

not be permitted to play fast and loose, but must act at once. Delay and vacillation are fatal. These remarks are peculiarly applicable to speculative property, corporate stock, mining property, and the like.¹

Where property in controversy consists of corporate stock, mining claims, or other property subject to great fluctuations in value, one having a claim upon it must take steps to establish his title with all convenient speed.² Silence, delay, vacillation, acquiescence, or the retention and use of any of the fruits of the sale or trade that are capable of restoration, for any considerable time after the discovery of the fraud, constitute a complete and irrevocable ratification of the transaction.³ A party who delays the assertion of a right until the witnesses are dead or their memories blurred by mere lapse of time, deserves no favor at the hands of a court of equity. This is what Judge Story meant when he said: "Laches makes men sin in their graves."⁴

Fed. 251, 256; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587, 592, 593; *Johnston v. Mining Co.*, 148 U. S. 360, 370, 371, 13 Sup. Ct. 585; *Clarke v. Hart*, 6 H. L. Cas. 638, 656; *Bush v. Sherman*, 80 Ill. 175.

¹ *Kinne v. Webb*, 54 Fed. 34, 38, 12 U. S. App. 137, 145; *Flint v. Woodin*, 9 Hare, 618, 622; *Lloyd v. Brewster*, 4 Paige, 537, 27 Am. Dec. 88; *Diman v. Providence, W. & B. R. R. Co.*, 5 R. L. 130; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587, 592; *Grymes v. Sanders*, 93 U. S. 55, 62; *McLean v. Clapp*, 141 U. S. 429, 432, 12 Sup. Ct. R. 29; *Kerr on Fraud*, p. 306; 1 *Morawetz on Corporations*, § 108.

² *Curtis v. Lakin*, 36 C. C. A. 223, 94 Fed. 251, 256.

³ *Stuart v. Hayden*, 72 Fed. 402, 411, 36 U. S. App. 463; *Rugan v. Sabin*, 53 Fed. 415, 418, 10 U. S. App. 519, 531; *Kinne v. Webb*, 54 Fed. 34, 38, 12 U. S. App. 137, 144; *Scheftel v. Hays*, 58 Fed. 457, 460, 19 U. S. App. 220, 226; *McLean v. Clapp*, 141 U. S. 429, 432, 12 Sup. Ct. R. 29; *Grymes v. Sanders*, 93 U. S. 55, 62; *Twin Lick Oil Co. v.*

Marbury, 91 U. S. 587, 591; *Hall v. Fullerton*, 69 Ill. 448, 450; *Bush v. Sherman*, 80 Ill. 160, 176; *Day v. Fort Scott Investment Co.*, 153 Ill. 293, 304, 38 N. E. 567; *Follansbe v. Kilbreth*, 17 Ill. 522, 528, 65 Am. Dec. 691; *Estes v. Reynolds*, 75 Mo. 563, 565; *Johnston v. Mining Co.*, 39 Fed. 304, 2 *Pomeroy's Eq. Jur.*, § 897, quoted 153 Ill. 305.

⁴ *Gould v. Gould*, 3 Story R. 516, 539, 540, Fed. Cas. 5,637; *Prevost v. Gratz*, 6 Wheat. 481, 497, 498; *Walker v. Carrington*, 74 Ill. 446, 453; *Badger v. Badger*, 17 U. S. L. Ed. 836, 838; *Hammond v. Hopkins*, 36 U. S. L. Ed. 134; *Carpenter v. Carpenter*, 70 Ill. 457, 464; *Walker v. Ray*, 111 Ill. 315, 322; *Stiger v. Bent*, 111 Ill. 328, 341; *Howe v. S. Park Com'rs*, 119 Ill. 101, 106, 7 N. E. 333; *Shovers v. Warriok*, 153 Ill. 355, 38 N. E. 792; *Mettler v. Miller*, 129 Ill. 630, 22 N. E. 529; *Orthwein v. Thomas*, 127 Ill. 554, 569, 21 N. E. 430, 4 L. R. A. 434, 11 Am. St. 159; *Sands v. Kagey*, 150 Ill. 109, 36 N. E. 956. As to effect of laches on degree of proof required, see *ante*, § 347.

§ 411. **Relief to be recommended — Continued.**— The defense of laches must, ordinarily, be interposed by the pleadings.¹ This may be done by answer,² by plea,³ or it may be interposed by demurrer where it appears on the face of the bill.⁴ Yet there are certain cases where the court may of its own motion refuse to grant relief, although the grounds of such relief may be properly presented or relied upon by the defendant. Thus the court may refuse relief because it would be against public policy, although both parties may be willing to submit the matter on its merits to the court. So, also, the court of its own motion may refuse relief on ground of laches though the objection is not interposed by the defendant.⁵ When a party appeals to a court of equity to enforce a stale demand, there must be cogent and weighty reasons presented why it has become so. Good faith, conscience and reasonable diligence are the elements that call a court of equity into activity. In their absence the court remains passive, and declines to extend its relief or aid.⁶

It is not the policy of the law to stir up the embers, or to rekindle, or to allow to be rekindled, the fires of past strifes

¹ Dawson v. Vickery, 150 Ill. 398.

² Pierce v. McClellan, 98 Ill. 245; Trustees v. Wright, 12 Ill. 432, 440, 441; Beach v. Shaw, 57 Ill. 17, 26; O'Halloran v. Fitzgerald, 71 Ill. 53, 58.

³ Story, Eq. Pl. §§ 814, 815.

⁴ Bank v. Carpenter, 101 U. S. 567, 568; Speidel v. Henrioi, 120 U. S. 377, 387, 7 Sup. Ct. R. 610; Brown v. The County of Buena Vista, 95 U. S. 157, 159; Landsdale v. Smith, 106 U. S. 391; Bryan v. Kales, 134 U. S. 126, 10 Sup. Ct. R. 435; Williams v. Hart, 116 Mass. 513; Fogg v. Price, 145 Mass. 513, 516, 14 N. E. 741; Partridge v. Wells, 30 N. J. Eq. 176; Olden v. Hubbard, 84 N. J. Eq. 85, 86; Walker v. Ray, 111 Ill. 315, 320, 321; Furlong v. Riley, 103 Ill. 628, 630; Nichols v. Otto, 132 Ill. 91, 93, 23 N. E. 411; Kerfoot v. Billings, 160 Ill. 563, 43 N. E. 804. See also Story, Eq. Pl., §§ 484, 503, 505, 751.

⁵ Badger v. Badger, 2 Wall. 87, 2 Cliff. 137, 154, Fed. Cas. 718; Marsh v.

Whitmore, 21 Wall. 178, 185; Sullivan v. Portland R. R. Co., 94 U. S. 806; Lakin v. Sierra, etc. Min. Co., 25 Fed. 337, and cases there cited; Richards v. Mackall, 124 U. S. 183, 8 Sup. Ct. R. 437; Taylor v. Holmes, 127 U. S. 489, 8 Sup. Ct. R. 1192; Norris v. Haggin, 136 U. S. 386, 10 Sup. Ct. 942; Wollensak v. Reiher, 115 U. S. 96, 5 Sup. Ct. 1137.

⁶ McDearmon v. Burnham, 158 Ill. 55, 62, 41 N. E. 1094; Carpenter v. Carpenter, 70 Ill. 457; Bowman v. Wathen, 1 How. (U. S.) 189, 194; Beckford v. Wade, 17 Ves. 87; Piatt v. Vattier, 9 Pet. 405, 416; Kane v. Bloodgood, 7 Johns. Ch. 90, 111, 11 Am. Dec. 417; Decouche v. Savetier, 3 Johns. Ch. 190; Hughes v. Edwards, 9 Wheat. 489; Marquis of Cholmondeley v. Lord Clinton, 2 Jac. & Walk. 1, 141; Elmendorf v. Taylor, 10 Wheat. 152, 168; Miller v. McIntyre, 6 Pet. 61, 66.

and controversies, the flames of which have once been extinguished or the burning quenched by reconciliation and compact between the parties. The law loves peace and hates dissensions and turmoils and litigations, and all its policy and maxims are against their being revived or unnecessarily prolonged. The tendency of the judicial mind has always been not to resuscitate contentions once fairly put to rest, nor permit the way to be opened by which they may be renewed or further agitation succeed.¹

“No doctrine is so wholesome, when wisely administered, as that of laches. It prevents the resurrection of stale titles and forbids the spying-out from the records of ancient and abandoned rights. It requires of every owner that he take care of his property, and of every claimant that he make known his claims. It gives to the actual and longer possessor security, and induces and justifies him in all efforts to improve and make valuable the property he holds. It is a doctrine received with favor, because its proper application works justice and equity, and often bars the holder of a mere technical right, which he has abandoned for years, from enforcing it when its enforcement will work large injury to many.”²

§ 412. Relief to be recommended — Continued.— In another class of cases the master may feel constrained to recommend a denial of the relief sought, although the proof may fully establish the allegations of the bill. Reference is here had to a certain class of cases in which the evidence may disclose that one of the parties has obtained a grievous advantage over the other — one that ordinarily would demand redress at the hands of the court, yet the master and the court are alike unable to render any assistance. Reference is here had to cases where both parties engage in an illegal transaction and then fall out over the division of the spoils, in which event the court will refuse its assistance to either, but will leave them both in the situation in which they have placed themselves;³

¹ *Keroheval v. Doty*, 81 Wis. 476, 484; *Skeels v. Phillips*, 54 Ill. 309; *Neustadt v. Hall*, 58 Ill. 172; *Bestor v. Wathen*,

² Justice Brewer in *Naddo v. Bar-* 60 Ill. 188; *Railroad Co. v. Mathers*,
don, 51 Fed. 493, 495. 71 Ill. 592; *Compton v. Bank*, 96 Ill.

³ *Miller v. Marckle*, 21 Ill. 152, 153; 301, 36 Am. R. 147; *Kirkpatrick v.*

and this principle is applied though only a part of the consideration is illegal. In such a case the whole contract is void.¹

But while the general rule is as stated, there is a well recognized exception to it, viz., where the parties are not *in pari delicto*. This exception to the rule is thus admirably stated by Mr. Pomeroy: "When the contract is illegal, so that both parties are to some extent involved in the illegality — in some degree involved in the unlawful taint,— but are not *in pari delicto*; that is, both have not, with the same knowledge, willingness and wrongful intent, engaged in the transaction, or the undertakings of each are not equally blameworthy, a court of equity may, in furtherance of justice and of a sound public policy, aid the one who is comparatively the more innocent. . . . It exists when the contract is intrinsically illegal, and is of such a nature that the undertakings or stipulations of each, if considered by themselves alone, would show the parties equally in fault, but there are collateral and incidental circumstances attending the transaction and affecting the relations of the two parties which render one of them comparatively free from fault. Such circumstances are imposition, oppression, duress, threats, undue influence, taking advantage of weakness, and the like."² So, too, a contract or transaction may be illegal, yet, where one party is induced to enter into it under "strong pressure," it forms an exception to the rule, and equity will grant relief.³ The one may be the victim of the other's persuasive power, and thus entitled to relief.⁴ Again, a party having otherwise an excellent case may be defeated by the election of a wrong remedy.⁵

Clark, 132 Ill. 342; Smith v. Rowley, 66 Barb. 503; Halloran v. Halloran, 137 Ill. 110, 27 N. E. 82; Allison v. Hess, 28 Iowa, 389.

¹ Henderson v. Palmer, 71 Ill. 579, 22 Am. R. 117; Shenk v. Phelps, 6 Ill. App. 613; Halthaus v. Kuntz, 17 Ill. App. 434; Wolf v. Fletemeyer, 83 Ill. 418; 1 Parsons on Con. (6th ed.) 456; Chitty on Contracts, 657, 658.

² Pomeroy's Eq. Juris., § 942, quoted and approved in Paige v. Hieronymus, 180 Ill. 637, 641, 54 N. E. 583. See also Baehr v. Wolf, 59 Ill. 470; 1 Story's Eq. Juris., § 300.

³ Ford v. Harrington, 16 N. Y. 285; Roman v. Mall, 42 Md. 513; Green v. Corrigan, 87 Mo. 359; Barnes v. Brown, 32 Mich. 146; Baehr v. Wolf, 59 Ill. 470; Richardson v. Crandall, 48 N. Y. 348; Tracy v. Talmage, 14 N. Y. 162; Brooks v. Martin, 2 Wall. 70; Curtis v. Leavitt, 15 N. Y. 9.

⁴ Cunningham v. Holcomb, 1 Tex. Civ. App. 331, 21 S. W. 125; Hess v. Culver, 77 Mich. 598, 18 Am. St. 421, 6 L. R. A. 578; Evans v. Funk, 151 Ill. 650; Bartholomew v. Bentley, 15 Ohio, 659, 45 Am. Dec. 596.

⁵ For a case appealing strongly to

§ 413. **Reporting the evidence.**—The rule requiring the evidence taken before a master, upon a reference, to be reduced to writing, is universal. After the evidence has been transcribed the witnesses should be required to affix their signatures to the same, but this is not absolutely necessary, and in actual practice is generally ignored and may be waived by counsel. The master desiring to have his work commend itself to the court should always have the deposition either signed or the report of the evidence show such waiver in writing.

What is to be done with the evidence after it is thus taken is determined differently in different cases, depending upon the order of reference, the statutory provision or rule of court.

The different courses of practice in this regard may be classified as follows:

First. Cases in which the whole of the evidence is required to be returned with the master's report.

The cases under this head may be classified as follows:

(a) Where the order of reference simply requires the master to take and report the evidence without his conclusions. In such a case his duty is that of a commissioner, and, of course, in obedience to such order he must report the whole evidence so taken to the court.

(b) Where the order of reference requires the master to take and report the evidence, together with his conclusions.

(c) Where a statutory provision or rule of court requires the master to return the evidence with his report. Such statutory provisions are found in Illinois and in Ohio, and perhaps in some of the other states.

(d) Where one or more of the parties, dissatisfied with the master's findings objects thereto, requests the return of the whole evidence, in order to have such finding reviewed by the court.

Second. Cases in which the master is required to return a part only of the evidence with his report.

the conscience of the chancellor, in E. 748, and for a precisely similar which the master's report was in case, where the master and the lower favor of the complainant, followed court were reversed because of a by a decree, also in his favor, and mistake in the election of the remedy, see *Anderson v. Chicago Trust* affirmed by the supreme court, see *Murray v. Tolman*, 162 Ill. 417, 44 N. & Sav. Bank, 195 Ill. 341, 63 N. E. 203.

(a) This occurs where one or more of the parties is dissatisfied with the master's findings, object to the same, and request the return only of that part of the evidence bearing upon such findings. Of course it is understood that the above statement implies that there is no provision in the order of reference requiring the return of the whole of the evidence, and, also, the absence of a statutory provision or rule of court on the subject.

Third. Cases in which the master returns no part of the evidence with his report.

This occurs in the following cases, there being no statute, rule of court or provision in the order of reference requiring it:

(a) Where neither party objects to the master's report, but permits a decree to be entered thereon.

(b) Where both parties are satisfied with the facts stated by the master, but simply object to the inferences or conclusions drawn therefrom.

(c) Where the party dissatisfied with the master's finding of fact fails to request the master to return the evidence bearing thereon.

(d) Where the dissatisfied party relies upon some error apparent on the face of the report.

Unless the master is required by one or the other of the foregoing methods, to wit, either by statute, a rule of court, or a provision in the order of reference, it is irregular and improper to report the evidence upon which he bases his findings, but he should report his conclusions only.¹

§ 414. Reporting the evidence—Continued.—When the decree fails to require the master to report the evidence it is his duty, according to the general rule, which prevailed in English practice, simply to state the facts found by him, as is done in a special verdict, and it is irregular for him to report the evidence. That practice has been recognized and pointed out as the correct mode of proceeding in this country.²

¹ *Kerosene Lamp Heater Co. v. Fisher*, 1 Fed. 91; *Union Sugar Refinery v. Mathiesson*, 3 Cliff. (U. S.) 146, 149, Fed. Cas. 14,398; *Friedman v. Schoengen*, 59 Ill. 377; *Prince v. Cutler*, 69 Ill. 270; *McClay v. Norris*, 4 Gilm. 370, 386; *Hayes v. Hammond*, 162 Ill. 133, 135, 44 N. E. 422; *Ronan v. Bluhm*, 173 Ill. 277, 284, 50 N. E. 694; *Schnadt v. Davis*, 185 Ill. 476, 482, 57 N. E. 652; *Bailey v. Myrick*, 52 Me. 132; *Simmons v. Jacobs*, 52 Me. 147, 153; *Remsen v. Remsen*, 2 Johns. Ch. 495, 498; *In the Matter of Hemiup*, 3 Paige, 306.

² 1 Hoffman's Ch. Pr. 545; 2 Dan.

It is the duty of the master, upon the application of the parties, to furnish the evidence appertaining to the matter of exception. The proper practice is for the master to take down in writing the testimony taken before him, and, upon exception made, furnish all the evidence in reference to the exception for which the parties may apply, and that the parties shall specify the evidence upon which they respectively rely. And in Alabama it is said that each exception itself should designate the objectionable item, and point to the evidence by which it is designed to support it.¹

In commenting upon the action of the master where he reported the evidence in full, the chancery court of Upper Canada say: "We are all agreed that this is a very inconvenient and objectionable course where the master has not been expressly directed by the decree to report the evidence; and where there is such a direction the evidence should appear, if practicable, by way of schedule or of reference, rather than in the body of the report."²

The practice in the federal courts is stated as follows:

When exceptions are filed to the master's report, if either party desires the evidence reported, they request the master to report it in whole or in part, as the case may be. It is the usual course for the master to comply with such request; but if neither party makes the request, it is not incumbent upon the master to report the evidence at all. He may or may not, in his discretion, as he sees fit. If he does report the evidence at the request of one or both of the parties, it then becomes the duty of the court, if there be proper exceptions, to review the questions of fact embraced in the report as well as the questions of law. But, if the evidence is not reported, the court does not review the facts, but simply re-examines the questions of law. "Such," says Justice Clifford of the United States circuit court, Massachusetts district, "has been the

Ch. Pl. & Pr. 1480, 1481, note; 2 Ala. 796, 805; Kinsey v. Kinsey, 37
Smith's Ch. Pr. 162; In the Matter Ala. 893.
of Hemiup, 3 Paige's Ch. R. 305; ¹ Mahone v. Williams, 39 Ala. 202,
Mott v. Harrington, 15 Verm. 185, 222, 223.
197; Darrington v. Borland, 3 Porter, ² Sovereign v. Sovereign, 15 Grant's
9, 39; Kirkman v. Vanlier, 7 Ala. Ch. R. 559, 565.
217, 227; Alexander v. Alexander. 8

practice in this circuit as far back as the knowledge of the justices now holding the court extends."¹

§ 415. Reporting the evidence — Continued.—Under the Massachusetts practice, although an order only requires a master to take testimony and report his findings, yet it is the duty of the master, "at the request of either party, to report the evidence so far as is necessary to bring intelligently before the court any question of law raised before the master at the hearing; and it is open during the hearing before the master to move the court to require him to report the whole testimony or any part of it, if, in the progress of the hearing, either party considers such a course necessary or desirable; but in the hearing of long, complicated accounts this is not required, unless some good reason therefor is shown to the court. When, however, the hearing before the master is closed, and the draft of his report is known, an application on the part of the losing party, then for the first time made, from an order to report the whole testimony, is never looked upon with favor. Such a motion to modify the order of reference, and recommit the report with directions to report the evidence, will be denied unless the court is satisfied from the report, or otherwise, that justice requires it."²

Under the practice in that state an order was made by a single justice, referring the cause to the master to report his findings; the parties prayed no appeal, but appeared before the master, had a hearing, and the master reported his findings. The defendant then moved to recommit the cause to the master with instructions to report the testimony, which motion was overruled. The order referring the cause to the master did not require him to report any part of the evidence, and there was nothing to show that the parties were not content at the outset with the form in which the order was made. Held, that "whether the master should afterwards be ordered to report the evidence, or any other part of it, was discretionary with the court."³

¹ Union Sugar Refinery v. Mathieson, 8 Cliff. 146, 149.

² Parker v. Nickerson, 137 Mass. 487, 493; Da Silva v. Turner, 166 Mass. 407, 44 N. E. 532.

³ Freeland v. Wright, 154 Mass. 492, 28 N. E. 678; Atlanta Mills v. Mason, 120 Mass. 244; Nichols v. Ela, 124 Mass. 333.

Whether or not the master shall take the testimony in writing and report it to the court, together with his findings, is, under the Massachusetts statute, "determined by the order of reference made in each case." Under statute of 1859, chapter 237, it is "left wholly to the discretion of the court in each case to determine whether there shall be any reference to a master, and what shall be the terms of the reference; and the master is not bound to report all the evidence taken before him, unless the order of reference requires him to do so.¹ But while it is discretionary with the court to order the master to report the evidence, yet, in all cases where a party desires to contest the master's finding of fact, it is his duty to request the master to return such portions of the evidence, with his report, as have a bearing thereon.²

§ 416. **Reporting the evidence — Continued.**— In Georgia it is provided by the Code, sections 4587, 4588, that the master shall file the evidence with his report, while similar provisions are found in the statutes of Illinois³ and of Ohio.⁴ Before the adoption of this statute the English practice was followed in Illinois, the master not being required to report any part of the evidence unless upon the request of an objecting party.⁵ Under the former practice either party might apply to a master for certified copies of such evidence as might be, in their judgment, necessary to a hearing of matters excepted to; but under the Illinois statute as it now stands, the whole evidence is reported to the court, and the parties may select from it such portions as are relevant to the exceptions and present them to the court.⁶ In New Jersey the statute provides that, if a report of the evidence taken before him shall become necessary in the progress of a hearing, "for use on appeal from the decree of the chancellor therein or otherwise, then such master shall settle and sign such report;"⁷ and, for the purpose of enabling the master to properly discharge this duty, he is authorized to "em-

¹ *Parker v. Nickerson*, 187 Mass. Ill. App. 376; *Prince v. Cutler*, 69 Ill. 487, 491, 492. 270.

² *Da Silva v. Turner*, 166 Mass. 407, 44 N. E. 532.

³ Rev. Stat., ch. 22, § 39.

⁴ Rev. Stat., § 5222.

⁵ *McClay v. Norris*, 4 Gilm. (Ill.) 694.

370, 386; *Friedman v. Schoengen*, 59

⁶ *Hayes v. Hammond*, 162 Ill. 183, 185, 44 N. E. 422; *Schnadt v. Davis*, 185 Ill. 476, 482, 57 N. E. 652; *Ronan v. Bluhm*, 173 Ill. 277, 284, 50 N. E.

⁷ Rev. Stat. 1895, p. 397, § 129.

ploy a competent stenographic reporter to take down the evidence."¹

In West Virginia there are three contingencies upon which the evidence may be brought before the court and made a part of the record:

First. When a party files exceptions with the commissioner (master), and calls for the evidence upon which the exceptions are based.

Second. The commissioner may, of his own motion, where he has doubt as to the weight of testimony on any particular point, send up the evidence bearing upon the same.

Third. Where exceptions to a report are filed in court, the court, of its own advice or on motion of a party, may direct the evidence to be sent up, but this rests in the discretion of the court.²

Under the chancery practice in Maine a master in chancery is not required to report the evidence to the court unless the order of reference requires it. Where he is simply required to "ascertain facts and state them in the report," it is not his duty to return the evidence upon which he bases his findings.³ The same was true under the New York practice,⁴ and this is the practice in Alabama, the register returning no evidence with the report except upon request of the party desiring to contest his findings.⁵ As we have already seen, a similar practice prevails in the United States courts. When exceptions are filed to the master's report, if either party desires this evidence to be reported, he requests the master to report it in whole or in part, as the case may be. The usual course is for the master to comply with such request; but if neither party makes the request it is not incumbent upon the master to report the evidence at all.⁶

¹ Id., § 130.

² Arnold v. Slaughter, 36 W. Va. 589, 597; Thompson v. Catlett, 24 W. Va. 524; Lynch v. Henry, 25 W. Va. 416; Chapman v. McMillan, 27 W. Va. 220; Anderson v. Caraway, 27 W. Va. 385.

³ Bailey v. Myrick, 52 Me. 132; 137, Simmons v. Jacobs, 52 Me. 147, 153.

⁴ Remsen v. Remsen, 2 Johns. Ch.

495, 498; In the Matter of Hemiup, 8 Paige, 806; 1 Hoffman, Ch. Pr. 545.

⁵ Kirkman v. Vanlier, 7 Ala. 217, 227; Alexander v. Alexander, 8 Ala. 796, 805; Kinsey v. Kinsey, 37 Ala. 393.

⁶ Union Sugar Refinery v. Mathieson, 3 Cliff. 146, 149, Fed. Cas. 14,898.

§ 417. **Evidence — How reported.**— Sometimes orders are not to report the testimony; sometimes to report it, if either party require him to do so. In such cases the testimony should be annexed, certified by the master, but not embodied in his report; but whether there is such a provision or not, a party who intends to carry the report before the court may apply to the master for certified copies of the testimony to be used upon the argument.¹ The evidence should, if practicable, appear by way of schedule attached to the report, rather than in the body of the report.² It is not necessary that the report of the evidence of each witness should, as written up, be signed. All that is necessary is for the master to duly certify the evidence and return it to the court with his report.³ In Ohio it is only necessary for the witnesses to sign their names to their depositions when the court directs it to be done.⁴ The report of the evidence should show everything that took place in the master's office; all objections to evidence and all exceptions to the rulings of the master, as well as all motions made by either party, and what disposition made of same, should be distinctly stated.⁵ The burden rests upon the party objecting to a finding to see that all the evidence in support thereof is properly certified and returned with the master's report. In other words, it is the duty of a party excepting to a finding depending on evidence to see that the master states all the evidence heard by him bearing upon such finding.⁶ And the certificate of the master must state that the evidence returned is all that was heard by him. This is the rule in a bill of exceptions,⁷ and the same rule holds as to a certificate of evidence in chancery cases,⁸ and the same reason for the rule applies to

¹ Hoffman, Ch. Pr. 545.

² *Sovereign v. Sovereign*, 15 Gr. Ch. 559, 565.

³ *Wallen v. Cummings*, 88 Ill. App. 45; *Lester v. Toerpe*, 88 Ill. App. 47.

⁴ Rev. Stat., § 5223.

⁵ See *ante*, § 290.

⁶ *Donnell v. Columbian Ins. Co.*, 2 Sum. 366, 371; *Campbell v. Harmon*, 43 Ill. 18, 20; *Prince v. Cutter*, 69 Ill. 267, 270; *Mott v. Harrington*, 15 Vt. 185, 197; *Goodman v. Jones*, 26 Conn. 264, 267; *Simmons v. Jacobs*, 52 Me. 147, 153, 154.

⁷ *Miner v. Phillips*, 42 Ill. 123; *Cogshall v. Beesley*, 76 Ill. 445; *Fuller v. Bates*, 6 Ill. App. 442; *First Nat. Bank v. Haskell*, 23 Ill. App. 616; *C. M. & St. P. R. R. Co. v. Walsh*, 51 Ill. App. 584; *Horn v. Yates*, 90 Ill. App. 588, 590.

⁸ *Allen v. Le Moyne*, 102 Ill. 25; *Groenendyke v. Coffeen*, 109 Ill. 325; *Brown v. Miner*, 128 Ill. 148, 21 N. E. 223; *Shoper v. Schaffer*, 140 Ill. 470, 30 N. E. 872; *City of Salem v. Lane & Bodley Co.*, 90 Ill. App. 560, 562.

a master's certificate of evidence. It is therefore safe to say that unless his certificate shows that he has returned all the evidence taken into court, his report should be returned to him with directions to return all the evidence taken. A certificate stating that the report contains all the evidence submitted to him and on which he acted is insufficient.¹

Where the record shows that there was evidence introduced before the master and not returned by him the error was held to be fatal on appeal.² The master's report may, however, show on its face that his certificate that he returned *all* the evidence taken by him is not true, and yet, if no exception is taken on this ground, but only raises the question as to the propriety of certain allowance, this will not invalidate the report.³ In another case it was held that the master's report would not be set aside for a failure, upon request, to report all the evidence on which he based a certain finding, where the facts upon which his finding was based were specifically stated, and were not claimed to be without evidence, and tended to support the inferences drawn therefrom.⁴ When a decree finds the facts from the evidence, depositions and master's report, and the depositions, and evidence preserved in the master's report, are insufficient to support the findings, it will be presumed by the court that other evidence was heard, where there is no certificate of either the master or the court that the record contains all the evidence.⁵

In a former chapter we have seen that it is duty of the master to be personally present at the examination of the witnesses,⁶ and this fact should be distinctly stated in the master's certificate to the report of the evidence. In New Jersey it is provided by chancery rule that the master may permit the examination to be taken by a stenographer selected by him, who shall be sworn by him faithfully and truly to take stenographically and to reproduce in manuscript or typewriting the testimony given, but in such case the master shall accompany the

¹ Schnadt v. Davis, 185 Ill. 476, 488, 57 N. E. 652.

² Ronan v. Bluhm, 173 Ill. 277, 50 N. E. 694.

³ Pearson v. Darrington, 32 Ala. 227, 238.

⁴ Enright v. Amsden, 70 Vt. 188, 40 Atl. 37.

⁵ Groenendyke v. Coffeen, 109 Ill. 325, 335.

⁶ Ante, § 214.

depositions with his certificate that they were taken in his immediate presence and hearing by a stenographer sworn as above required, and that he believes that they accurately state the evidence given.¹ In a recent opinion the supreme court of Illinois condemns the loose practice of swearing the witnesses and taking their testimony in the absence of the master; his certificate, therefore, should certainly show his personal presence at the examination of the witness.²

§ 418. Evidence — Effect of failure to report.— Where an objection is to a finding of fact made by the master and an inspection is necessary in order to determine an exception based on such objection, the failure of the master to return the evidence with his report is a fatal error.³ Unless the statute otherwise provides, the master need not report to the court the evidence upon which he bases a finding, unless directed so to do, either by the court or the objecting party, and, unless this is done and the evidence returned to the court, the finding cannot be disturbed.⁴ Where the evidence upon which the master bases his findings is not reported, it must be presumed that his findings of fact are correct. If the finding, however, is not warranted under the law, of course it may be corrected.⁵ If the failure to return the evidence is the fault of the party making the objection by neglecting to request the master to return the evidence, then a motion to direct the master to return the evidence is properly overruled, in the discretion of the court.⁶ In another case it was held that, under an order referring a cause to a master to "hear the parties and report the facts," it is not the duty of the master to report the evidence bearing upon any finding of fact. Upon a motion to recommit for that purpose being overruled, it was proper to enter a decree upon the findings, the court holding that it was entirely within the discretion of a single justice to decline to order the evidence, or any part of it, reported.⁷

¹ N. J. Ch. Rule No. 44.

² See *Schnadt v. Davis*, 185 Ill. 476, 57 N. E. 652.

³ *Ronan v. Bluhm*, 178 Ill. 277, 50 N. E. 694; *Salomon v. Stoddard*, 107 Ill. App. 237; *Lange v. Heyer*, 195 Ill. 420. See *post*, §§ 529-534, 648.

⁴ *Bowers' Adm'r v. Bowers*, 29 Grat.

697; *Robinson v. Allen*, 85 Va. 721, 8 S. E. 865.

⁵ *Boston Iron Co. v. King*, 2 Cush. 400.

⁶ *Da Silva v. Turner*, 166 Mass. 407, 44 N. E. 532.

⁷ *Bowers v. Cutler*, 165 Mass. 441-443, 43 N. E. 188.

§ 419. Time of making and filing report.— If no objections are filed with the master to his draft report, or, if objections filed are overruled, nothing remains to be done by the master but to return his report in the clerk's office. In case objections were filed to the draft, and any or all of them are sustained, of course the report must be modified accordingly. If no time is fixed by the order of court, by rule of court, or by statute, the master should proceed to the completion of his report as soon as he reasonably can, consistent with the proper discharge of his duties. The master should not make a final report until he is in a position to deal with all matters referred to him.¹ If one of the parties should die after the hearing the master may nevertheless sign his report and return it.² A report returned into court sealed up and indorsed, "fees to be paid before opening," is not "filed" within the meaning of the federal rule.³

As indicated above, the time for the completion and filing of his report may be limited:

First. By a provision in the order of reference.⁴

Second. By standing order of court;⁵ or rule of court.

For example, a New Jersey chancery rule provides that the report of masters must be made "within thirty days from the time of the hearing, unless further time be granted by the chancellor."⁶

In a Pennsylvania cause a rule of court provided that the matter referred should be presented to the master within twenty days from time of reference, and that he should proceed without delay to hear the matter referred and make his report thereon to the court within six months. The parties did not present the matter to the master until after the expiration of the twenty days. Afterward the parties, "pursuant to agreement," proceeded to take the testimony, and nearly three years after the order of reference was made the master's report was filed. The plaintiff thereupon moved the court to strike the report from the files because the matter was not

¹ Smith v. Crooks, 8 Gr. Ch. 821.

⁴ Harding v. Harding, 180 Ill. 481.

² Maddock's Ch. Prac. 888; Morgan v. Scudamore, 3 Ves. 197.

⁵ Eyles v. Ward, 2 Peere Wma. 517.

³ Donaldson v. Johnson (R. I.), 16 Atl. Rep. 140; Beach, Eq. Pr., sec. 707.

⁶ N. J. Ch. Rule, No. 204.

presented to the court within the twenty days and the master failed to return the report within the six months as provided by the rule. The court held that as the delay was at the plaintiff's request, and the taking of testimony was "pursuant to agreement," it would be intolerable to let the plaintiff take advantage of his own delay, and overruled the motion.¹

Third. The time may be limited by a statutory provision. For example, in South Carolina it is provided by statute that masters in chancery shall in all cases referred to them make and file with the clerk of the court their "reports within sixty days from the time the action shall be finally submitted to them, and in default thereof they shall not be entitled to any fees." The statute further provides that nothing therein contained "shall prevent parties to said action, or their attorneys, from extending the time by mutual consent in writing."² In Tennessee, when the decree does not fix the time in which the report shall be made, the code requires a master to proceed with the least practicable delay to comply with the terms of the reference, and any neglect of duty in this respect is punishable by a fine of fifty dollars, and the master is also guilty of a misdemeanor, and subject to removal from office.³

§ 420. Failure to file in time.—Although the order of reference may expressly direct the master to file his report within a given period, yet the parties by their conduct may waive the right to object to the filing of the report at a later period. Thus a master was directed by the order of reference to submit his report within fourteen days from the date of the reference, but, as a matter of fact, the matter was pending in the master's office over three years, it being more than three years from the date of the order of reference before the report was filed, and this, too, without any modification or extension given by the court. It was held that the conduct of the master was inexcusable, unless the time limited was too short, or the appellant was responsible for the delay or waived his right to object. The record showed that on the very day that ap-

¹ *Hoofstittler v. Hostetter*, 172 Pa. St. 575. See *Gibbon's Appeal*, 104 Pa. St. 587; *City v. McMannis*, 42 Leg. Int. 160; *Brennan's Est.*, 65 Pa. St. 16; *Backus' Appeal*, 58 Pa. St. 186; *Phillips' Appeal*, 68 Pa. St. 180; *Worrall's Appeal*, 110 Pa. St. 842.
² Rev. Stat. 1898, sec. 844.
³ *Gibson, Suits in Ch.*, § 582.

pellee closed the proof on her side, appellant commenced taking evidence in his own behalf and continued from day to day, almost daily for more than one month, and thereafter from time to time at intervals for thirteen months. Not only this, but for two years thereafter appellant failed to complain to the chancellor of the conduct of the master, but on the contrary he prepared and submitted to the master a long brief on the questions before him, filed and argued objections with the master to the preliminary report, asked the master to report the evidence without his conclusions, and, in short, only complained of the master's conduct in failing to comply with the clause of the order of reference limiting the time for filing the report when it became apparent that the report would not be satisfactory to him. The court rightly held that he had by his conduct waived his right to complain.¹ This is a good illustration of the rule that *consensus tollit errorem*. Notwithstanding the order of reference may limit the time for filing the master's report, yet the court may receive and act upon a report filed after the expiration of the limit, precisely as if it had been filed within the limit. "It is a matter within the discretion of the court to receive and consider the master's report, although he fails to conform to the time fixed by the order."² Although a standing order of court requires the report to be filed within a given time, yet it is sufficient if it is filed before any proceeding or order is made thereon.³ But it is said that, under the English practice, where a time was fixed wherein the master was to make his report and he made it afterward, his report was disallowed.⁴

§ 421. Effect of filing report.—A sharp line is drawn, by the act of filing, between the authority of the master and that of the court. All power of the master terminates at once by the act of filing, and no power exists on the part of the court to perform any act affecting the report until it is actually filed in court. A report must be filed before any further proceedings can be taken, either by way of confirmation, hearing ex-

¹ *Harding v. Harding*, 180 Ill. 481, 499-501, 54 N. E. 587.

² *Harding v. Harding*, 180 Ill. 481, 502, 54 N. E. 587.

³ *Eyles v. Ward*, 3 Peere Wms. 517.

⁴ *Pr. Reg. Ch.* 878.

ceptions, or otherwise.¹ So, too, exceptions to a master's report should not be taken until the report has been filed.² After the master returns his report into court all his authority in the case is ended. Any act performed by him after that is utterly void and "has no more force or validity than if done by somebody passing on the street who was never heard of in the case." He never can have authority to perform any other act in the case "unless conferred upon him by some new order of court."³

After the master has closed and returned his report his duties are ended and nothing further can be done before him, unless upon further direction of the chancellor, and he has no power to further certify as to any matter before him in the course of the inquiry upon which he has reported, unless called upon to do so by the court. While the matter is still before him he may, at the request of any party, report specially as to any matters which he may deem proper for the information of the court, as all parties interested are then before him to present their views, both as to the substance and form of the special matter reported; but, after the report is closed and returned, the contest can only be continued in court, and a further certificate, unless called for by the court, is irregular and improper.⁴ Any such certificate should be promptly stricken from the files on motion, or by the court *sua sponte*.⁵

After the master has made his report upon all matters included in the reference he is *functus officio*,⁶ and he should not, after such report is completed, certify as to any matters be-

¹ Jellett v. Anderson, 8 P. R. (Ont.) 387; Beames' Orders, p. 292; Wynne v. Jackson, 2 Sim. & St. 226; Rushton v. Troughton, 2 Sim. 38.

² 2 Daniell's Ch. Pr. (5th ed.) 1812; Beach, Eq. Pr., sec. 707, note.

³ McBride v. Gwynn, 83 Fed. 402.

⁴ Rosebatch v. Parry, 27 Grant's Ch. R. 193, 199.

⁵ For a case where the court called upon the master for a further certificate, after the return of his report into court, see Robinson v. Whitcomb, 20 Grant's Ch. R. 415. The

report failing to state whether or not the defendant had notice of the proceedings in the master's office, the chancellor, deeming such notice necessary under the circumstances, although the defendants had been defaulted, called upon the master for information in this regard, saying: "I desire to be furnished with a certificate from the master stating how the reference was proceeded with in his office, and whether the defendant was notified."

⁶ Rae v. Geddes, 8 Chy. Ch. R. 404.

fore him in the course of the inquiry upon which he has made his report, unless required to do so by the court.¹ The master by permission of the court may amend his report, by correcting an error of expression, so as to correctly report the result at which he has arrived.² But a report followed by an order for decree cannot be amended while the order for decree remains in full force.³

¹ Rosebatch v. Parry, 27 Gr. Ch. 198. ² Utica Ins. Co. v. Lynch, 2 Barb.

³ Heywood v. Miner, 102 Mass. 466. Ch. 578.

CHAPTER VII

HEARING BEFORE THE CHANCELLOR.

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I. REPORT MUST BE RETURNED TO THE COURT.

§ 422. Master's report must be filed.— As we have already seen, it is the duty of the master, as soon as his report is complete, to return the same to the court.¹ This is a part of the master's duty under every order of reference, as his action has no vitality until confirmed by the court.² This is performed by delivering the report to the clerk of the court, though in practice the master frequently delivers his report to the counsel of the party in whose favor it is made to be delivered by the latter to the clerk of the court. United States Equity Rule 83 provides, among other things, that "the master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order-book." This must be done in every case before any action whatever can be taken by the court. No provision is made by the United States Equity Rules for any notice to counsel that the report has been returned to the clerk, and as, in most of the circuits, the masters give no notice to counsel that the report is in draft, the latter is under the necessity of inquiring of the clerk or master as to when the report is filed. In every case, unless the report is delivered to counsel, notice should be given

¹ *Ante*, § 419.

² *Boston v. Nichols*, 47 Ill. 353; *Wilhite v. Pearce*, 47 Ill. 412.

by the master that he has filed his report. This duty is sometimes enjoined by a statute or by rule of court. Thus in Georgia it is provided by the Code, sections 4588, 4589, that the auditor who performs the duties of the master, upon the filing of his report, is to give both parties or their counsel written notice, and that either party may file exceptions within twenty days after such notice is given.

Until a report of a master is regularly returned into court the chancellor has no power to approve the same, and it is error to make an order of approval in advance. No court can be certain in advance what will be the contents of a report; and to direct that it shall be confirmed before it is made is to go beyond competent judicial authority. The question of the propriety of its confirmation cannot be intelligently determined until it is laid before the court.¹ Therefore it is a fundamental rule that every report and certificate of whatever kind must be filed before it can be acted upon by the court; and any proceeding grounded thereon is irregular if taken before filing.² The report must be returned before the court will make any order based on the findings of the master. For this reason the court will decline to make any order requiring a party to pay money into court before the master has made his report.³ It may be said that this is not strictly true as to many matters, such as a refusal to answer on part of a witness, rulings of the master upon the evidence, and the like, where the matter is brought to the attention of the chancellor upon a "master's certificate."⁴ This, however, is rather a play upon words than otherwise, because a master's report is defined to be a "certificate to the court of the facts or matters directed to be ascertained by him;"⁵ and it is equally true of such certificate that it must be regularly returned into court and filed before any action can be taken thereon. The filing of a report forms the dividing line between the authority of the master and that of the court. The moment the report is filed the master becomes *functus officio*, unless some further duty is required of him by

¹ *Citizens' Sav. Bank v. Bauer*, 14 Civ. Proc. Rep. (N. Y.) 340, 343.

² *Harris v. Cotter*, 1 M. & K. 570; 2 Smith, Ch. Pr. (ed. 1834), 327.

³ *Fox v. Macreth*, 3 Bro. Ch. 45.

⁴ *Carleton v. Smith*, 14 Ves. 180.

⁵ 2 Maddock's Ch. Pr. (ed. 1837), 668.

a subsequent order of the court, such as an order of re-reference, or an order granting leave to the master to withdraw his report for the correction of a mistake or for amendment.¹

II. PRESUMPTIONS — BURDEN OF ATTACK.

§ 423. **Presumptions in favor of report.**—The master is an officer of the court, and, as such, it is presumed that every duty resting upon him has been properly discharged, unless the contrary is shown; therefore every presumption is in behalf of his report.² All reasonable presumptions are indulged in to support the master's rulings.³ Statements made by the master in his report must be regarded as true unless called in question by proper exceptions.⁴ This is sometimes enjoined by statute. Thus in Georgia it is provided by the Code, section 4581, that the report of an auditor "shall be *prima facie* the truth, either party having the liberty to except." This is true in regard to every ruling made by the master during the progress of a hearing as well as of his findings upon the issues presented to him. Any statement made in his report is presumed to be true, and the burden of proving the contrary rests upon the party attacking it, by affidavit or otherwise.⁵ The presumption being in favor of the correctness of the findings of the master, the burden of showing the contrary rests upon the excepting party,⁶ and he having the affirmative of the issue, has the opening and closing of the argument.

When the cause comes on for hearing before the chancellor on exceptions to the report of the master, such report must be taken to be correct until error is shown. The burden is on the exceptant,⁷ and until error is made clear the master's con-

¹ On the right and power of the court to permit the master, upon his own application, to withdraw his report for amendment, see *National Folding-Box & Paper Co. v. Dayton Paper-Novelty Co.*, 91 Fed. 822; *Heywood v. Miner*, 102 Mass. 466; *Webber v. Orne*, 15 Gray, 351; *Gardner v. Field*, 5 Gray, 600.

² *Lehman v. Levy*, 69 Ala. 48, 50.

³ *Winter v. Banks*, 72 Ala. 409, 410.

⁴ *Pearson v. Darrington*, 32 Ala. 227, 238.

⁵ 3 P. Wms. 142, note B.

⁶ *Howe v. Russell*, 36 Me. 115, 127; *Da Costa v. Da Costa*, 8 P. Wms. 140, note.

⁷ *Van Ness v. Van Ness*, 32 N. J. Eq. 669; *Nat. Bank of Metropolis v. Sprague*, 23 N. J. Eq. 81.

clusions must be regarded as correct.¹ The presumption being in favor of the conclusions of the master, unless the court is convinced that the master has erred the findings will be approved. They will not be disturbed unless shown to be erroneous.² In attacking a report of the master the burden lays on the exceptant. The report is not arbitrary or conclusive upon any one; "yet it shall be presumed *prima facie* to be true, and turns it upon the other side to shew the contrary."³ The presumption being in favor of the master's rulings and findings, the burden is on the objecting party to show that they are erroneous;⁴ and unless this is done the action of the master will be approved by the court.⁵

III. MOTION TO SET ASIDE REPORT.

§ 424. Attempting to get rid of an unfavorable report. Before taking up the discussion of the various methods of attacking a master's report it may be well to notice a course occasionally resorted to by a defeated party, which cannot be considered to be an attack upon the action of the master, but rather an effort to escape its effect. Sometimes a party dissatisfied with an unfavorable report attempts to avoid the effect of it by a motion to set it aside and have the cause heard by the court or by a jury. Issues of fact in equity causes may be heard by the court, or referred to a master for hearing, and, upon exceptions to his report, reviewed by the court; or may be tried by a jury under the direction of the

¹ Van Ness v. Van Ness, 32 N. J. Eq. 669; Clark v. Condit, 21 N. J. Eq. 322; Haulenbeck v. Cronkright, 28 N. J. Eq. 407.

² Lockhart v. Horn, 8 Woods, 542, 550, Fed. Cas. 8,446.

³ Allen v. Pendlebury, 8 Peere Wms. 142, note.

⁴ Cutting v. Florida Ry. & Nav. Co., 43 Fed. 743, 747; Jaffrey v. Brown, 29 Fed. 476; Medsker v. Bonebrake, 108 U. S. 66, 78, 2 Sup. Ct. R. 351; Mason v. Crosby, 3 Woodb. & Min. 258, Fed. Cas. 9,236; Hulings v. Hulings Lumber Co., 88 W. Va. 351, 370,

18 S. E. 620; Howe v. Russell, 36 Me. 115, 127; Da Costa v. Da Costa, 3 P. Wms. 140, note; National Bank v. Sprague, 28 N. J. Eq. 81; Pool v. Gramling, 88 Ga. 653, 16 S. E. 52; Springer v. Kroeschell, 161 Ill. 858, 43 N. E. 1084; Newcomb v. White, 5 N. Mex. 485, 28 Pac. 671; Medsker v. Bonebrake, 108 U. S. 66, 2 Sup. Ct. R. 351.

⁵ The court may, however, of its own motion, if not satisfied with the action of the master, recommit the matter to him with further directions. See *post*, § 506 *et seq.*

chancellor; but if a party intends to demand a trial by jury, he should ordinarily do so before the case is referred to the master. The court, in the exercise of its discretion, may doubtless order an issue to be submitted to a jury, even after the coming in of the master's report, if the evidence before the master appears to be conflicting, or his findings thereon are unsatisfactory, or the hearing before him has developed new questions of fact, or if, for other reasons, the court deems it fit that any issue in the case should be tried by a jury; but this course should never be pursued except good reason appears therefor, because, "to supersede the master's report, and order a trial by jury, merely because a party, who has been fully heard before the master, is dissatisfied with the result, would be to grant an unreasonable indulgence to him, and to do great injustice to the other party."¹ So, too, the court, if dissatisfied with the findings of a referee, may set aside the report and order a trial before himself, to the end that he may personally see the witnesses and hear their testimony, so that, with these aids, he may be better able to pass upon the credibility of their testimony and the weight which ought to be given to it.²

The right to ask that an issue, or issues, of fact be made by the chancellor and submitted to a jury for determination is one that may be waived, and is treated as waived unless seasonably asserted; and it is now settled that, after the whole cause has been referred to a master and his report has been filed, it is too late to insist upon a trial by jury as of right. The application should be made before the cause is referred, because a trial of all the issues of fact is inconsistent with a trial by jury.³ Questions of fact in equity are tried by the court in the first instance; or by a master, and, upon exceptions to his report, by the court, or upon issues submitted to a jury. They are in no given case, however, tried but in one mode, except where, on coming in of the master's report, the finding appears unsatisfactory, and the nature of the evidence disclosed presents a case which the court in its discretion ought

¹ *Atlanta Mills v. Mason*, 120 Mass. 244, 246.

² *Fairbanks v. Holliday*, Adm'x, 59 Wis. 77, 81.

³ *Parker v. Nickerson*, 137 Mass. 487, 492; *Atlanta Mills v. Mason*, 120 Mass. 244; *Nichols v. Ela*, 124 Mass. 333; *Hoitt v. Burleigh*, 18 N. H. 389.

to hear or send to a jury.¹ A party who has had his day in court has no right to complain of the court for refusing to allow him to subject the other party to further delay and expense by appeal from a master to a jury.² It would be unreasonable to permit a party to go to trial before a master and take his chances of a favorable report, and then, dissatisfied with the result, have another trial before a jury and thereby put the other party to unnecessary expense and trouble.³

It would be just as unreasonable as for a party to submit an issue of fact to a jury, and, upon receiving an unfavorable verdict, ask that a reference be made to a master to try the same issue. Again, a party dissatisfied with a master's report and seeking to avoid its effect may attempt to do so by dismissing his bill. It has been held, however, that after a case has been referred to a master, by consent of parties, the evidence heard, arguments of counsel made, a draft of the master's report submitted, and objections filed with the master, it is too late for the complainant to dismiss his bill.⁴

IV. REVIEWING ACTION OF THE MASTER.

§ 425. Method of reviewing the report.— Vice-Chancellor Wigram, speaking of the necessity of confirmation of a master's report to give it efficacy, says: "Of the various duties, the execution of which the court is in the habit of committing to the master, there are some, the completion of which is wholly committed to the master, so that his report or certificate requires no confirmation by the court to give it effect. With respect to others the report of the master has no operation without the subsequent confirmation or further direction of the court. With respect to those certificates, or reports in the nature of certificates, which do not require confirmation, the master issues no warrant on preparing them, and the only way of obtaining the opinion of the court upon such a proceeding is by petition, praying either that the conclusion of the master may

¹ Nichols v. Ela, 124 Mass. 338, 336. Union Tel. Co., 16 C. C. A. 367, 69 Fed.

² Nichols v. Ela, 124 Mass. 338. 666, 670, 671. See also Kimberly v.

³ Freeland v. Wright, 154 Mass. 492, Arms, 129 U. S. 512, 9 Sup. Ct. R. 28 N. E. 678. 355; Davis v. Schwartz, 155 U. S. 831,

⁴ Amer. Bell Tel. Co. v. Western 637, 15 Sup. Ct. R. 237.

be reviewed by the court, or for leave to except to the report. . . . The question of whether the report of the master is final without the subsequent confirmation of the court, or whether it requires such confirmation to make it effective, necessarily depends upon the terms of the order, or the nature and subject-matter of the reference, and not on the proceeding upon which the order of reference was made.”¹ It is only with reference to reports of the master which require confirmation by the court that it is proposed, in this section, to state the various methods by which they can be brought before the chancellor for review.

The register, in laying down the various methods of reviewing the findings of a master, in the case of *Price v. Shaw*,² said: “I have ever understood that there is not any judgment, or opinion, of a master but may, if dissatisfactory, be corrected by one of the following modes.”

First. Objections and exceptions. In every case, when the master by his report finds a fact and his judgment on evidence, he delivers a draft of his report before he signs it, that the parties may take objections. These objections are passed upon by the master, and, unless sustained, are followed by exceptions in court. These objections and exceptions bring up for review before the chancellor such findings of fact. This is the regular practice everywhere unless changed by statute or rule of court.

Second. Objections and exceptions. In cases where a party, by inadvertence, accident, mistake or surprise, has been prevented from filing *objections* with the master, the chancellor may send the case back to the master with liberty to file objections there, in order that the matter may come on regularly on objections and exceptions.

Third. Exceptions. Where the reference is to see whether an answer, examination or deposition is pertinent or impertinent, the master’s judgment is founded merely on his conception of the matter. These reports are not confirmed; he issues no draft to ground objections; but the party takes exceptions to the report in the first instance.

¹ *Ottey v. Pensam*, 1 Hare, 322; *Russell v. Buchanan*, 9 Sim. 167.

² 2 Dick. 732.

Fourth. Exceptions. In extraordinary cases, where no objections were filed with the master, and justice seems to demand it, the court, by special order, may permit exceptions to be taken in court to findings of fact when no objections were filed with the master. The *exceptions* then come on regularly for hearing, precisely as if *objections* had been previously filed.

§ 426. Method of reviewing the report—Continued.—

Fifth. On motion. Where the party in whose favor the report has been made brings the same on for confirmation, if there is no contest of fact, but only a question whether the master has erred in the application of the law, the chancellor will review this question, neither *objections* nor *exceptions* being necessary.

Sixth. On motion. Where there is an error on the face of the report, such as a mistake in the schedules, the court, on motion, may correct the same, neither *objections* nor *exceptions* being necessary.

Seventh. On motion. Where the master errs in the admission or rejection of evidence, or in other matters, during the progress of the hearing, the dissatisfied party may get the matter certified to the chancellor, and have such error reviewed. This is the general rule, but there are jurisdictions where all questions are reserved until the coming in of the master's report.

Eighth. By petition. Where a report is under an order of reference for the master to inquire and state his opinion whether an infant is a trustee or mortgagee within the statute 7th of Queen Anne, to approve of a guardian, make an allowance for maintenance, and the like; *exceptions* do not lie to such reports, but the report is stated, and brought before the court by petition; and the court will confirm, or vary it, according as the judgment of the court coincides in or differs from the opinion of the master.

Ninth. To these various methods of reviewing the master's findings may be added that of appeal from the master to the chancellor. Under the orders of the chancery court of Upper Canada a master's report is reviewed by an appeal to the court. Such appeal lies at any time, upon motion, until one month after signing the report, without written objections or

exceptions being previously taken.¹ By Chancery Order No. 688 parties are required to raise before the master all points which may afterward be raised on appeal.² Before notice of appeal is given the report must be filed.³ The notice must "set out the grounds of objection."⁴ These grounds upon which the appeal is brought should be set out *seriatim*, and include all the objections intended to be urged.⁵

V. CORRECTING ERRORS IN PROCEDURE.

§ 427. **Attacking action of master on ground of irregularity.**—It would seem, on principle, that all errors in procedure, whether by improper rulings made during the progress of the hearing or by failing to report upon matters submitted, or by passing upon matters outside of the order of reference, should be corrected on motion to re-refer the cause to the master with further directions. Indeed, some courts have gone so far as to hold that if a party proceeds by exception it constitutes a waiver of such irregularities. In a leading case in New York it was held that the filing of exceptions to a master's report, with the knowledge of irregularities upon the part of the master during the hearing, waives the right to object on account of such irregularities.⁶ In case the master proceeds irregularly, or neglects to report upon all the matters referred to him, or fails to give notice, or refuses to hear proper proof, or otherwise denies a party his just rights, the proper course for the aggrieved party is to apply to the court to set aside the report and refer it back to the master with proper directions, supporting his application by affidavit of the facts, where they do not otherwise sufficiently appear.⁷

¹ Holmsted & Langton's Judicature Act, pp. 866, 867.

² Id., p. 865.

³ Hayes v. Hayes, 8 P. R. 546.

⁴ Order 642.

⁵ Ross v. Perrault, 13 Gr. Ch. 206. Of this recapitulation of the various methods of reviewing the acts of the master, numbers one, three and eight are from the register's statement of the practice as given in

Price v. Shaw, *supra*. All the others are sustained by the authorities given in this chapter, and, it is believed, include every possible method of calling in question the conduct or acts of a master under a reference.

⁶ Tyler v. Simmons, 6 Paige, 127. See also Johnson v. Swart, 11 Paige, 385; Beach, Eq. Pr., sec. 703. See *ante*, §§ 313-323.

⁷ Gibson, Suits in Ch., § 594.

If the master fails to discharge the duty imposed upon him by the order of reference the remedy of the party aggrieved thereby is by an appropriate motion in the court below.¹ Where the master misconstrues the order of reference and as a consequence fails to discharge fully the duty required of him under it, the court will re-refer the matter to him with directions to proceed according to the real intent of the order;² and the same is true in case the master wholly misconceives his duties under the issues made by the pleadings and order of reference, and not only fails to discharge the duties imposed upon him, but proceeds to investigate, make findings and report to the court upon matters wholly unauthorized, his report will be recommitted to him with instructions to "inquire and report on the case as provided in the original order."³ If a cause is referred to the master with directions to examine and report as to the existence or non-existence of a fact, it is his duty to draw the conclusion from the evidence produced before him and to report that conclusion only; and if he reports the evidence, leaving the court to draw the conclusion, the matter will be again referred to him with direction to draw and report his conclusions.⁴ Where the master fails to report his conclusions when directed so to do, it is proper practice for the court to re-refer the matter to him with further directions; yet, it is held, that where facts are so clearly stated in a report as necessarily to involve a particular consequence, it is for the court to act upon the facts so reported, and that it is not proper ground of exception that the master has omitted to point out the consequence.⁵

§ 428. **Attacking action of master on ground of irregularity — Continued.**— Where the master fails to execute the order of the court the matter should be referred back to him that he may complete his duty; thus, where the inquiry was directed as to the death of one Charles Lee, and the master reported the evidence but failed to state his conclusions, Lord

¹ *Gleason & Bailey Mfg. Co. v. Hoffman*, 68 Ill. App. 294, 296; *Deimel v. Parker*, 59 Ill. App. 426, 164 Ill. 627; *Tyler v. Simmons*, 6 Paige, 127; *Stevenson v. Gregory*, 1 Barb. Ch. 72.

² *Wilson v. Corson*, 1 W. N. C. 98.

³ *Connor v. Edwards*, 86 S. C. 563, 15 S. E. 706; *Blauvelt v. Aokerman*, 20 N. J. Eq. 141.

⁴ *In re Hemiup*, 8 Paige, 805.

⁵ 1 *Daniell*, Ch. Pr. (ed. 1887), 952; *Bick v. Motly*, 2 M. & K. 312.

Eldon sent the case back to the master, remarking: "It is singular that the court should send such a question to the master and that he should send it back to the court. . . . The master has not executed the order. He ought to have drawn the conclusion."¹

The master must discharge the duties enjoined upon him by the order of reference, doing neither more nor less; in other words, he must obey the directions of the court. Even though the order of reference is inconsistent with an opinion of the chancellor filed in the cause, the master must follow the terms of the order, if clearly written.²

After a court of competent jurisdiction has ordered the master to perform an act, such as to pay out money in his hands belonging to one of the parties to an action, it is no part of his duty to interpose quibbles or search for pretenses to justify him in disobeying the order; but duty, as well as common honesty, requires prompt compliance with such order.³ Especially is it true that he must not attempt to usurp the functions of the court. He is an officer of the court, and, as such, must obey its commands. The master is not authorized to go behind the order of reference to determine equities existing between the parties. He must take the account in obedience to the decree, and if any equities remain to be settled it must be done by the chancellor.⁴

Sometimes a duty is imposed upon a master by a statute or a rule of court, in which event, if he fails to discharge such duty, the court will re-refer the matter to him. For example, in New Jersey, under Chancery Rule 164, in a divorce case where the charge is desertion, unless the master reports the facts and circumstances under which the desertion took place, and the reasons which caused or provoked it, if the same can be ascertained, the matter must be referred back to the master to take further proofs, and make a report in conformity to the rule.⁵

¹ Lee v. Willook, 6 Ves. 605.

² Taylor v. Kilgore, 88 Ala. 214, 228.

³ Partlow v. Moore, 184 Ill. 119, 123, 56 N. E. 817.

⁴ Izard v. Bodine, 9 N. J. Eq. 809.

⁵ Stone v. Stone, 28 N. J. Eq. 409;

Leaming v. Leaming, 25 N. J. Eq. 241. For rule see Dickinson, Chancery, p. 461, note.

§ 429. Attacking action of master on ground of irregularity — Continued.— In case the master fails to report upon important questions of fact necessary to be passed upon by him the report will be recommitted to the master with further directions.¹ So, too, where he disregards the instructions of the court, or where he does not furnish the facts necessary for the court to make a decree, the report will be set aside though no exceptions have been filed.² If a master in chancery fails to call upon either of the parties to produce books, papers or vouchers relating to the matters referred to him, and does not examine the parties under oath, the proper course for a dissatisfied party is to apply to the court by motion for an order requiring him to do what he should have done. This is also the practice where proper testimony is refused on a reference. Such irregularities in proceeding by the master cannot be corrected by excepting to the report. Exceptions to the findings are only proper when the dissatisfied party desires the court to review the conclusions of the master of law or fact on the evidence before him, touching the reference.³

Another irregularity to be corrected by motion to re-refer is where a party complains of want of notice of proceedings in the master's office. If a party has not been notified of the proceedings in the master's office, the chancellor, unless the error was waived, should re-refer the cause to the master upon that ground.⁴ This should regularly be done upon motion supported by affidavits, though in the Illinois case cited in the foot-note the defendant excepted and read his own affidavit in support of the exception. Motion may be made and heard by the court to recommit a report of the master or commissioner because of want of notice or insufficiency of notice, but the party making such motion should show beyond question that he is not guilty of negligence, otherwise the court will be justified in refusing him.⁵ Such motion must be made in apt time; for example, an objection that the master's report was returned without giving any notice to the party, or giving

¹ Webster Loom Co. v. Higgins, 39 Fed. 462.

² Lang v. Brown, 21 Ala. 179, 56 Am. Dec. 244.

³ Emerson v. Atwater, 12 Mich. 814, 822, citing Schwarz v. Sears,

Walk. Ch. (Mich.) 19; Ward v. Jewett, id. 45; Hoff. Mast. in Ch. 58, 59.

⁴ Whiteside v. Pulliam, 25 Ill. 285, 288.

⁵ Snickers v. Dorsen, 2 Munf. 505.

him an opportunity to be heard by exception, must be taken by motion before filing the exception to the report.¹ If a party desires to attack a master's report on the ground of want of notice of proceedings in the master's office he must do so in the court below. On appeal it is too late.²

§ 430. **Attacking action of master on ground of irregularity — Continued.**— It has been held that the proper course is, where the master reports upon matters not authorized by the order of reference, not to except to the report, but to move the court to re-refer it to the master for review; indeed, the safer course, in all cases where a party desires to attack the master's action on the ground of irregularity, is to proceed by motion, for the reason that by excepting he waives the irregularity.³ If the master exceeds his powers and reports upon matters not referred to him, it has been decided that the proper course is to move the court to re-refer the case to the master for review, or if no such application is made, and the report is confirmed, the court will pay no attention to it, except so far as warranted by the order of reference.⁴ The practice in this regard, however, is not uniform, for it has been held that questions not referred to the master but passed upon by him may be called in question by exceptions;⁵ and in Georgia it has been held that the master has no authority to take testimony or to pass upon any matters not submitted to him by the order of reference, and if he does so exceptions should be sustained thereto or it should be stricken out on motion, or treated as surplusage.⁶ The court thus recognizes either one of three courses as proper: either to except to such superfluous matter, move to strike it out, or to treat it as surplusage and ignore it. So, too, Judge Story held that where the master proceeds to investigate matters not put in issue by the pleadings and not within the order of reference and makes a finding thereon, in addition to the duties imposed upon him by the pleadings and order of reference, and the court is satisfied with the legitimate

¹ *Lamson v. Drake*, 105 Mass. 564.

² *Shenandoah Valley Nat. Bank v. Shirley*, 26 W. Va. 568, 569.

³ *Tyler v. Simmons*, 6 Paige, 127; *Walker v. White*, 5 Fla. 478, 486.

⁴ *Daniell*, Ch. Pr. 1296, citing *Jenkins v. Briant*, 6 Sim. 605; *Levert v.*

Redwood, 9 Port. (Ala.) 79; *Gordon v. Hobart*, 2 Story, 248, Fed. Cas. 5,608; *Harris v. Fly*, 7 Paige, 421.

⁵ *Taylor v. Robertson*, 27 Fed. 587.

⁶ *McMahon v. Paris*, 87 Ga. 660, 662, 13 S. E. 572.

findings, the report will be confirmed after striking out such superfluous matters.¹

The report of a master, so far as it relates to matters not referred to him, is a nullity. The fact that the parties raise no objection at the hearing before the master does not confer authority on him to pass upon such matters, and the court on exceptions will strike out such superfluous matters and confirm the report, if otherwise correct.² Or the court may, when the master permits the reference to go beyond the matters in controversy, confirm the report as to matters that are within the order, if the objecting party has suffered no harm from the erroneous action of the master.³ The safer practice, however, is to strike out the superfluous matters, and confirm the report as to the remainder if found to be correct. If, however, the court can see that the findings of the master have in any way been influenced by the investigation of matters not properly before him, then the court should recommit the whole matter to the master with further directions. Although the master may certify that the main issue submitted to him is a matter which in fact is not submitted to him at all, and proceed to make a finding thereon, and certifies that *all* the allegations of the bill are supported by the proofs, when in fact no proof at all has been submitted in support of one of the principal allegations, yet this will not invalidate his report if the evidence as a matter of fact fully sustains the report and the other essential matters.⁴

§ 431. Attacking action of master on ground of irregularity — Continued.—A report, if inconsistent or in conflict with the original decree, cannot be affirmed by the chancellor. As long as the original decree stands unmodified the subsequent proceedings must be in harmony with it.⁵ Should the master's findings be inconsistent with it, it is the duty of the court to set aside the report and refer it back to the master with further directions, even though no exceptions are taken to the same. Should the court, for any reason, deem the findings of the master correct, notwithstanding the original decree,

¹ Gordon v. Hobart, 2 Story, 243, Fed. Cas. 5,608.

² Gore v. Poteet (Tenn. Ch.), 46 S. W. 1050.

³ Arnold v. Slaughter, 86 W. Va. 589, 596, 15 S. E. 250.

⁴ Harding v. Harding, 180 Ill. 481, 504, 54 N. E. 587.

⁵ Lang v. Brown, 21 Ala. 179, 56 Am. Dec. 244-249.

on argument of the exceptions, the court should direct the report to stand over, and order that portion of the original decree containing the erroneous directions to be reheard.¹ But, if the chancellor deems the report erroneous, and stands by the original decree, it is his duty to either "direct the master to review his report, in order to conform it to the decree under which it is made, or to disregard it *in toto*, and order him to report under the original decree."²

VI. ATTACKING MASTER'S FINDINGS OF FACT.

§ 432. **Exceptions to master's findings of fact — Definition — General principles.**— Findings of fact are reviewed by the chancellor only on exceptions taken by the dissatisfied party. An exception, in the sense here used, may be defined to be a formal protest in writing against the conclusion of the master. Each finding is objected to separately, beginning with a recital of the conclusion of the master, as follows: "For that the master hath found," etc., and concluding, usually, with a statement of the exceptant's contention, beginning: "Whereas, the said master ought to have found," etc. This statement of what the exceptant thinks the master ought to have found is wholly unnecessary, as the chancellor is not limited to the suggestion made, but may adopt any ground of objection to the finding which, in his judgment, may seem right and proper, and the party himself is not thereby precluded from arguing any other ground which may suggest itself to him on the hearing. Where an exception to a report not only states that the master ought not to have reported as he has done, but suggests what he ought to have found, the court in allowing the exception, and referring it back to the master, does not adopt the conclusion suggested in the exception, but leaves the whole subject of the reference to be considered by the master, either upon the old evidence or upon further evidence which may be brought before him.³

This conclusion of an exception varies but little from that of the objections to a master's draft report, the latter concluding: "In all which particulars the said complainant (or de-

¹ Id.

³ Livesey v. Livesey, 10 Sim. 331;

² Id. See also Turner v. Turner, 1 Twyford v. Traill, 3 M. & C. 645. See Dick. 313; s. c., 1 Swans. 156; 2 Daniell, Ch. Pr. (6th ed.) 1316. Daniell, Ch. Pr. 1501.

fendant, as the case may be) objects to the draft of said report, and submits that the same ought to be varied and altered," while exceptions to the findings of a master usually terminate with: "Wherefore the said complainant (or defendant, as the case may be) doth except to the said report, and appeals therefrom to the judgment of this court."¹ Exceptions are usually prepared by and must always be signed by counsel.² Objections to a master's draft report and the exceptions filed upon the coming in of the report are substantially the same in form. Indeed, the terms "objections" and "exceptions" are frequently used interchangeably.³ When exceptions are taken, after objections have been made to a draft report and disallowed, the exceptions must conform to such objections, and, though different in form, they must be substantially the same.⁴ Indeed, it is the practice, generally, to prepare the objections in the form of the intended exceptions, and afterward, by an order of court, to convert them into exceptions.⁵

In case the objections, filed before the master to his draft report, are converted into exceptions, upon the coming in of the report, by stipulation of the parties and an order of court, which is the usual and customary practice,⁶ such stipulation and order may be in the following form:⁷

Stipulation.

In the Circuit Court of the United States for the Northern
District of Illinois, Northern Division.

Joshua C. Sanders	}	Amended bill.
v.		
Village of Riverside.	}	No. 21,878.
Village of Riverside	}	Cross bill.
v.		
Joshua C. Sanders.	}	

In the above cause it is hereby stipulated by and between the parties thereto that the objections heretofore filed before

¹ 3 Barbour, Ch. Pr. 507, 508.

² Daniell, Ch. Pr. (6th ed.) 1316.

³ Brockman v. Aulger, 12 Ill. 277, 280; Pennell v. Lamar Ins. Co., 78 Ill. 306; Cox v. Pierce, 120 Ill. 557, 12 N. E. 194; Cheltenham Imp. Co. v. Whitehead, 128 Ill. 279, 285, 21 N. E.

569; Mech. Bank v. Bank of Brunswick, 3 N. J. Eq. 437. See *ante*, § 385.

⁴ Ballard v. White, 2 Hare, 158; Daniell, Ch. Pr. (6th ed.) 1316.

⁵ Daniell, *loc. cit.*

⁶ See *post*, § 454.

⁷ Copied from record. 118 Fed. 720.

the master to the draft report shall stand as and in lieu of exceptions filed before the court.

JOHN L. PEARSON,
SAMUEL W. PACKARD,
Solicitors for Joshua O. Sanders.
AMOS C. MILLER,
Solicitor for the Village of Riverside.

Order of Court.

Joshua O. Sanders
v.
The Village of Riverside. } Amended bill.
No. 21,878.

The Village of Riverside
v.
Joshua C. Sanders. } Cross bill.

On stipulation of counsel this day filed:

It is hereby ordered that the objections filed in the above entitled cause before the master stand as and in lieu of exceptions filed before the court.

Such exceptions, when properly taken and filed in time, present an issue to the chancellor whether or not the master erred in his findings of fact,¹ such as that they are not sufficiently specific,² or that they fail to include all the issues,³ or that they are not supported by the evidence.⁴

§ 433. Form of exceptions.—Exceptions to a master's findings may be in form as follows:

Exceptions to Master's Report.

STATE OF ILLINOIS, } ss. In the Superior Court of Cook County.
County of Cook. } To the August term thereof, A. D.
1902.

John K. Dickson,
Complainant,
v.
Wm. T. Barnes,
Samuel A. Jones and
Hannah M. Jones,
Defendants. } Gen. No. 144,638.
Term No. 472.
In Chancery.

Exceptions taken by Wm. T. Barnes and Samuel A. Jones, two of the above defendants, to the report of G. Fred. Rush,

¹State v. Grover, 10 Ora. 66; Abernathy v. Withers, 99 N. C. 520, 6 S. E. 876; Battle v. Mayo, 102 N. C. 413, 9 S. E. 384; Torrey v. Scranton, 133 Pa. St. 123, 19 Atl. 351; Kraemer v. Adelsberger, 122 N. Y. 467, 25 N. E. 859; 8 Ency. Pl. & Pr. 285.

²Englebrecht v. Rickert, 14 Minn. 140.

³Coghlan v. South Carolina R. Co., 142 U. S. 101, 12 Sup. Ct. R. 150; Bender v. Matney, 122 Mo. 244, 26 S. W. 950.

⁴Thompson v. Hazard, 120 N. Y.

the master to whom this cause stands referred, and which report bears date the 29th day of July, 1902.

First exception. For that the said master, in his said report, hath found, etc. (state the finding objected to), whereas the said master should have found, etc. (state what is claimed ought to have been found).

Second exception. For that the said master, in his said report, hath found, etc. (state the finding objected to), whereas the said master should have found, etc. (state what is claimed ought to have been found).

Third exception. For that, etc.

Wherefore the said defendants do except to the said report and appeal therefrom to the judgment of this court.

DANIEL S. BAKER,
Solicitor for Defendants.¹

§ 434. Who may file exceptions.—It may be broadly stated that in all jurisdictions where a party is required to file objections to a master's draft report, such party is entitled to file exceptions upon the coming in of the report, and it may be further stated that in such jurisdictions only such parties as have filed objections to the draft report will be permitted to file exceptions to the report. Daniell says that all parties to the record who are interested in the matter in question may take exceptions to the report, and where there are several sets of parties appearing by different solicitors they may, if they are not disposed to join, each take exception, although their grounds of exception are the same.² That is to say, different parties interested in the subject of the report may take exceptions either jointly or separately, as they see fit, even though they offer the same objections.³

634, 24 N. E. 278; Daniels v. Smith, 130 N. Y. 696, 29 N. E. 1098; Dates v. Winstanley, 53 Ill. App. 623; Cheltenham Imp. Co. v. Whitehead, 128 Ill. 279, 21 N. E. 569; Miller v. Tracy, 86 Wis. 380, 56 N. W. 866; Kiger v. Franklin, 15 Ind. 102; National Commercial Bank v. McDonell, 92 Ala. 387, 9 So. 149; Joyner v. Stancill, 108 N. C. 158, 12 S. E. 912; 8 Ency. Pl. & Pr. 283.

¹ See Barbour, Ch. Pr., Form No. 247; Hoffman, Ch. Pr., Form No. 198. For form of exceptions to master's report in United States courts, see 4 Desty, Fed. Proced. 630; Loveland,

Forms of Federal Procedure, p. 229, No. 280. For New Jersey forms of exceptions, see Sinnickson v. The Adm'rs of Bruere, 9 N. J. Eq. 659; Newark Plank Road Co. v. Elmer, id. 754. For form of exceptions to master's report in Georgia see Poulain v. Poullain, 76 Ga. 420. Exceptant first states, "It is reported in said report," etc., and then states what the master should have found by adding: "to which complainants except, and allege that," etc.

² Ch. Pr. (6th ed.) 1811.

³ 2 Barton, Ch. Pr. 650.

It is the better practice for each party to file his own exceptions, because when an exception is made by one party and relied upon by another, if it be waived by the person taking it, it will be considered as equally abandoned by the person who relies upon it.¹ One party may, however, avail himself of the benefit of an exception taken by another, in some cases, such as where upon an accounting the court sustained an exception by one of several persons having a common interest in the fund, and thus surcharged the account, it was held by two state courts that all persons interested took the benefit of the exception and of the increase of the fund, and that the decree should not merely add to the share of the exceptor his proportion of the amount surcharged.²

It will be noted, Daniell says, the parties "*interested* in the matter in question may take exceptions." This is correct, because, where there is error in a master's findings, parties not affected thereby have no cause of complaint. In order to justify a party in filing exceptions to a master's report it must appear that he is substantially affected by the erroneous rulings. If it appear that the errors complained of are of no "practical importance" to the objector, his exceptions should be overruled.³ Or if, for any reason, a party's interest in the matter litigated has become extinguished, he will not be permitted to file objections to the master's findings.⁴

§ 435. Who may file exceptions — Continued.— A party may, however, limit, qualify or forfeit his right to take exceptions. An instance is mentioned above where a person, made a party because of his interest, parts with such interest after suit brought. So, too, by statute or rule of court in some jurisdictions, parties in default are precluded from taking exceptions to the master's report. For example, in Alabama it is provided by Chancery Rule No. 95 that "A defendant against whom a decree *pro confesso* has been entered, and who has not appeared before the register on the reference, shall not be allowed to except to the report, but, as to such defendant, the report shall be confirmed when read." It is further provided

¹ Robertson v. Trigg's Adm'r et al., 82 Grat. 89.

² Taylor v. Robertson, 27 Fed. 537; Foster's Federal Practice, § 315.

³ McCargar v. McKinnon, 17 Grant's Ch. R. 525.

⁴ Thompson v. Luke, 10 Grant's Ch. R. 281.

that "Any defendant who failed to appear before the register on the reference, or is otherwise in contempt, or who has not submitted to the jurisdiction of the court, shall not be allowed to except to the report of the register, but, as to such defendant, same shall be confirmed when read." It is further provided that "A defendant against whom a decree *pro confesso* is in force, and who appeared before the register on a reference, may except to the report." While in others, parties failing to appear before the master are precluded from afterwards questioning his report. For example, a New Jersey chancery rule provides that where a party is notified to appear before a master and refuses or neglects to attend, the report of the master shall become absolute as to such defendant, unless cause be shown to the contrary.¹

The rule is different, however, in Illinois. In that state a defaulted party may attack the master's report by exceptions.² Such defaulted party must, however, have previously filed objections with the master as a basis for such exceptions.³ Such defaulted party is limited as to his attack upon the master's report. Where a party has permitted a decree *pro confesso* to be entered against him for the want of an answer, he is precluded from questioning the sufficiency of the evidence to support the finding of the master, if such findings are within the allegations of the bill;⁴ and the fact that he did not appear before the master and object to the report does not preclude him from afterward insisting that the decree is not supported by the allegations of the bill.⁵

§ 436. Who may file exceptions — Continued.— A defendant who is in default for the want of an appearance will not

¹ N. J. Ch. Rule No. 25.

² Brockman v. Aulger, 12 Ill. 277, 279; Hurd v. Goodrich, 59 Ill. 450, 455; Pennell v. Lamar Ins. Co., 73 Ill. 303; Dates v. Winstanley, 53 Ill. App. 623, 627; Burke v. Tutt, 59 Ill. App. 678; Cheltenham Imp. Co. v. Whitehead, 128 Ill. 279, 284, 21 N. E. 569; Fergus v. Chicago Sash and Door Co., 64 Ill. App. 364; Moore v. Titman, 38 Ill. 358, 366.

³ See "Defaulted Defendants — Rights of," *ante*, §§ 211, 213, and "The

Draft Report — Objections Thereto," *ante*, § 384.

⁴ Roby v. Chicago Title & Trust Co., 94 Ill. App. 379, 383.

⁵ Atwood v. Whittemore, 94 Ill. App. 294, 297; Gault v. Hoagland, 25 Ill. 266; Martin v. Hargardine, 46 Ill. 322; Hannas v. Hannas, 110 Ill. 53; Manchester v. McKee, 4 Gilm. 511, 517; Glos v. Swigart, 156 Ill. 229, 41 N. E. 42; Avery v. Maude, 112 Cal. 565, 44 Pac. 1020; Monarch Brewing Co. v. Wolford, 179 Ill. 252, 53 N. E. 583.

be heard to urge any objection to the sufficiency of a master's findings of fact. In such case the default admits all the material allegations of the bill, and it is wholly discretionary with the court whether it will require any evidence at all in support of the bill, and if it does call for evidence the court may still enter a decree *pro confesso*, although the evidence taken by the master and reported may be wholly insufficient. The proceedings are *ex parte*, and, as it would not be error to enter a decree without any proof, it certainly cannot be erroneous to enter a decree upon insufficient proof.¹ But while the defaulted defendant admits the truth of the allegations of the bill and therefore is precluded from raising any question as to the sufficiency of the proof on the coming in of the master's report as well as on appeal, yet he may, on error, contest the sufficiency of the bill itself, and insist that the averments contained in it do not justify the decree.² There is a distinction, however, in this regard between decrees entered *pro confesso* for want of an *appearance*, and decrees *pro confesso* for want of an *answer*.³

So, too, under the practice in the court of chancery, as it formerly existed in the state of New York, a party who, upon a reference, failed to appear before the master, was not thereby cut off from filing objections to the master's report, but he was not permitted to introduce any new matters in support of such objections.⁴ Creditors, too, who have established their claims before the master, are permitted to except to the report, although not parties to the suit.⁵ So, also, are creditors who have preferred their claims but have been rejected by the master.⁶ In all cases, however, where persons not parties to the suit desire to file exceptions, they must, before they do so,

¹ *Armstrong v. Douglas Park Building Ass'n*, 176 Ill. 298, 300, 52 Ill. App. 318; *N. E.* 886.

Johnson v. Donnell et al., 15 Ill. 97;

Starne v. Farr, 17 Ill. App. 491;

Humbert v. Stempel, 31 Ill. App. 550, 553-4.

² *Gault et al. v. Hoagland et al.*, 25 Ill. 266, 268; *North Chicago St. R. R. Co. v. Ackley*, 171 Ill. 100, 105, 49 N. E. 222, 44 L. R. A. 177; *Armstrong v.*

³ *Daniell's Pl. & Pr.* (6th ed.), p. 1175.

⁴ *Byington v. Wood*, 1 Paige, Ch. 145, citing *Howard's Equity Side*, 40.

⁵ *Wilson v. Wilson*, 2 Moll. 328.

⁶ *Mechanics' Bank v. Bank of New Brunswick*, 2 Green, Ch. 487; *Daniell, Ch. Pr.* (6th ed.) 1311.

obtain permission from the court. This is done by motion, notice thereof having been previously given.¹

§ 437. When exceptions are unnecessary — Reports not requiring confirmation.— There are some reports which do not require any confirmation, and others in which it is necessary, and, of those which do require confirmation, some are confirmed by orders *nisi* and absolute, and others are confirmed usually (if not necessarily) by motion or petition absolutely. It therefore becomes proper to examine what is the proper course of excepting or objecting to these different reports. As to those reports which do not require confirmation, it is clear that this peculiarity does not in itself preclude a dissatisfied party from excepting to a master's finding.² In some cases, however, the only mode of obtaining the opinion of the court upon such findings is by petition, praying either that the conclusion of the master may be reviewed by the court, or for leave to except to the report.³ So, too, wherever the master is required to make a certificate or report which does not require any exercise of discretion or judgment, as in the case of a certificate to the court of proceedings in his office, or of the fact that documents have not been deposited pursuant to an order, no objection or exception will be entertained by the court.⁴

Certificates of this description are of the same nature as the certificates of any other officer of the court who certifies as to a mere matter of fact belonging to his department. With respect to those reports which are made in consequence of interlocutory applications, and confirmed absolutely by motion or petition, they can only be objected to at the hearing of the petition to confirm them, or upon a petition presented for the express purpose of having it referred back to the master to review his report; and as to these, in jurisdictions where objections must be filed to the draft report as a basis for exceptions afterward to be taken, it has been decided that the same rule prevails with respect to such a petition as in the case of ordinary

¹ Daniell, *loc. cit.*, and note; Ottey v. Pensam, 1 Hare, 322, 325.

² Empringham v. Short, 11 Sim. 78; Daniell, Ch. Pr. (6th ed.) 1309.

³ Ottey v. Pensam, 1 Hare, 322;

Russell v. Buchanan, 9 Sim. 167; Daniell, *loc. cit.*

⁴ Kemp v. Wade, 2 Keen, 687; Jones v. Powell, 1 Sim. 387; Daniell, *loc. cit.*

exceptions to a master's report; namely, that no party can present such a petition unless he has previously carried in objections to the draft report.¹

In case of a master's report on a reference to determine whether a suit instituted in the name of infants by a *prochein ami* was necessary on the question whether the party dissatisfied therewith should raise the question by exceptions, the "register being consulted declared it to be the practice of the court not to except to reports of this kind (which were in the nature of causes for the opinion of the court), but to object to them on motion to confirm."² When a receiver's accounts are referred to the master to be reported upon, objections to the master's findings must be filed with the master; but where the receiver states his own accounts, and submits them to the master for inspection, under an order of court, the master acting in place of the court, in a judicial rather than ministerial capacity, no such objections are required.³

§ 438. When exceptions unnecessary — Continued — Conclusions of law.— In an Illinois case the supreme court of that state quote from Daniell as follows: "Where the master by his report *states all the facts correctly*, but is mistaken as to the legal quality of those facts, it is not necessary for the party dissatisfied with the master's finding to except to the report, as the question decided by the master may be opened upon further directions without exceptions." But the court say in the next sentence: "This is an exception to the general rule, but this does not fall within it, for it is not a case where the master states the facts, and the objections to the master's report are made for the first time in this court."⁴

The exception may be accurately stated as follows: Where the *facts* found by the master, and stated in his report, do not justify the legal conclusion at which the master arrived, no objections or exceptions are necessary in order to raise the question of the correctness of his conclusions. In such a case the report is inconsistent with itself upon its very face, and for that reason exception is made to the rule requiring objections and excep-

¹ Ottey v. Pensam, 1 Hare, 822; Daniell, 1810.

² Whitaker v. Marlar, 1 Cox, 285.

³ Cowdrey v. Railroad Co., 1 Woods, 831, Fed. Cas. No. 8,293.

⁴ Hurd v. Goodrich, 59 Ill. 450, 456; Daniell, Ch. Pr. (6th ed.) 1810.

tions in order to justify an examination of the master's work. Where the master, by his report, states all the facts correctly, but is mistaken as to the legal consequences of these facts, it is not necessary for the party dissatisfied with the master's finding to except to the report, as the question decided by the master may be opened upon further directions.¹ A statutory provision may, however, require exceptions to be taken in order to question the correctness of the master's conclusions of law. While under regular chancery practice no exceptions are necessary to raise the question whether or not a master has erred as to his conclusions of law, yet in Georgia, under the code, such exceptions are necessary. The code provides that either party may file exceptions to the master's report, to be separately classified as exceptions of law and exceptions of fact.² Where a party relies upon the contention that the statute is unconstitutional, it has been held that this need not be set out in the objections or exceptions.³ This is but an application of the rule that, where the error is a misconception of the law, no exception is necessary. The conclusion of the master being inconsistent with the law, the error appears on the face of the report. So, too, where the construction of a written instrument forms the subject of the master's findings, no exception is necessary in order to enable the dissatisfied party to contest it before the chancellor,⁴ because an error in this regard is but an erroneous conclusion as to the law.

In a case where it was referred to the master to determine to whom a policy of insurance belonged and the master's report stated all the circumstances, with his conclusion thereon, the master of the rolls held that, although no exceptions were taken to the report, yet it was "open to inquire whether the master's conclusion is right." This was evidently under the rule

¹ *Adams v. Claxton*, 6 Ves. 226; 85 Tenn. 430, 437; *Gay Mfg. Co. v. Branger v. Chevalier*, 9 Cal. 353; Camp, 15 C. C. A. 226, 68 Fed. 67.

Hayes v. Hammond, 162 Ill. 133, 61 Ill. App. 310; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 40 Fed. 476; ² Code, sec. 4589; *Camp v. Mayer*, 47 Ga. 414, 422.

Von Tobel v. Ostrander, 158 Ill. 499, 42 N. E. 152; *Monahan v. Fitzgerald*, 62 Ill. App. 193, 164 Ill. 525, 45 N. E. 1013; *Burke v. Davis* (U. S. App.), 81 Fed. 907; *Kingsbury v. Kingsbury*, 20 Mich. 212; *Steele v. Frierson*, 85 Tenn. 430, 437; *Fidelity Ins. Co. v. Shenandoah Iron Co.*, 42 Fed. 872; *Boesch v. Graff*, 133 U. S. 697, 10 Sup. Ct. R. 378.

⁴ *French v. Townes et al.*, 10 Grat. 513.

that, when all the facts are stated and an erroneous conclusion of the law applicable thereto is the only matter complained of, no exceptions are necessary.¹ The practice, therefore, of requiring the dissatisfied party to file objections before the master does not preclude him from being heard upon a question as to the correctness of the legal conclusion reached by the master. The cause remains under the control of the court until disposed of by a final decree, and until then it can revise the interlocutory decree or any proceeding in the cause; and it is its duty to correct any error of the master affecting the merits as well as any error of its own properly brought to its knowledge.²

§ 439. When exceptions are unnecessary — Continued — Error on face of report.—Another exception to the rule requiring objections and exceptions to the master's report, in order to warrant the chancellor in raising a question as to whether the results arrived at by the master are correct or not, may be stated as follows: When the report on its face shows that it is based on a wrong principle — is erroneous, — a neglect to file objections and exceptions does not preclude the party finding fault with it from having the report reviewed.

In an Illinois case the court held that the decree was erroneous and corrected the error, notwithstanding no objections or exceptions had been filed in the court below, for the reason that it came within the rule as above stated. The master found the facts in his report and stated them accurately, and as a legal conclusion held that one of the parties was entitled to priority of lien, when as a matter of law his lien was subject to that of another party to the suit. The report being inconsistent with itself in this regard and being erroneous on its face, it required no exceptions or objections to raise the question.³

This principle is an old one, and is frequently applied.⁴

The rule has been otherwise stated, as follows: "Where there is error apparent upon the face of the report, for example

¹ *Adams v. Claxton*, 6 Ves. 226, 230; *Perkins v. Fourniquet*, 6 How. 206; *Brodie v. Barry*, 1 Jac. & Walk. 470. *Fourniquet v. Perkins*, 16 How. 82.

² *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 40 Fed. 476, citing *Wooster v. Handy*, 22 Blatch. 308, 21 Fed. 51; ³ *Strang et al. v. Allen*, 44 Ill. 428, 434.

⁴ See *Brodie v. Barry*, 1 Jac. & Walk. 470.

if the facts stated contradict a conclusion, it is not necessary to except."¹

A reference to a master does not authorize a report by him more extensive than the allegations and proof warrant, and, if he does report upon such unauthorized matters, his report is erroneous on its face and may be questioned without any exceptions.² Such a report, although not especially excepted to prior to the hearing, may be objected to then, and, also, on error in the appellate court.³ As we have already seen, exceptions to the master's report are only proper in cases where he has come to a wrong conclusion upon the matters referred to him to ascertain or decide. Where he proceeds irregularly, or neglects to report the matters referred to him, the proper course for the aggrieved party is to move the court to set aside the report, or to refer it back to the master to perfect the same.⁴

¹ *Ottey v. Pensam*, 1 Hare, 322; *Gregory v. West*, 2 Beav. 541; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 40 Fed. 476; *Fuller v. McLean*, 8 Ontario P. R. Rep. 549; *Perry v. Phelps*, 17 Ves. 178; *Hoffman v. Knox*, 1 C. C. A. 535, 50 Fed. 490; *Tankersly v. Pettis*, 61 Ala. 354; *Noble v. Hallonquist*, 53 Ala. 229; *Stallworth v. Blum*, 50 Ala. 46; *P. & M. Bank v. Dundas*, 10 Ala. 661; *Bauman v. Bauman*, 18 Ark. 320, 68 Am. Dec. 171; *Eveland v. Stephenson*, 45 Mich. 394; *Walker v. Walke*, 2 Wash. (Va.) 195; *Beckham v. Duncan*, 5 S. E. 690; *Cookus v. Peyton*, 1 Gratt. 431; *White v. Johnson*, 2 Munf. 285; *Reitz v. Bennett*, 6 W. Va. 417; *Evans v. Shroyer*, 23 W. Va. 581; *Reed v. Nixon*, 36 W. Va. 681, 15 S. E. 416; *Washington County v. Jones*, 45 Iowa, 260; *Bean's Road*, 85 Pa. St. 280; *Slaughter v. Slaughter*, 8 B. Mon. (Ky.) 482; *Patterson v. Patterson*, 1 Robt. (N. Y.) 184; *Morris v. Taylor*, 23 N. J. Eq. 131, 136; *Ogle v. Adams*, 12 W. Va. 213; *Kester v. Lyon*, 40 W. Va. 161, 20 S. E. 933; *Ward v. Ward*, 40 W. Va. 611, 21 S. E. 746, 29 L. R. A. 449; *White v. Walker*, 5 Fla. 478, 486; *Owen v. Occidental Bldg. etc. Ass'n*, 55 Ill. App. 347; *Lever v. Redwood*, 9 Port. (Ala.) 75, 94; *Shipman v. Fletcher*, 91 Va. 473, 29 S. E. 325; *Hyman v. Smith*, 10 W. Va. 298; *Baltimore, etc. R. Co. v. Vanderwerker*, 44 W. Va. 229, 28 S. E. 829; *Gerald v. Miller*, 21 Ala. 433; *Himely v. Rose*, 5 Cranch, 313; *Gordon v. Lewis*, 2 Sumn. 143, Fed. Cas. 5,613; *Strang v. Allen*, 44 Ill. 429; *Brodie v. Barry*, 1 Jac. & Walk. 470; *Adams v. Claxton*, 6 Ves. 226; *Barbour*, Ch. Pr. 557; *Daniell*, Ch. Pr. (6th Am. ed.) 1310; 2 *Maddock*, Ch. Pr. (ed. 1837) 709; *Adam's Equity* (7th Am. ed.), 386.

² *White v. Walker*, 5 Fla. 478, 486.

³ *Minor's Inst.*, vol. 4, pt. 2, p. 1249; *Ogle v. Adams*, 12 W. Va. 213; *Boggs' Adm'r v. Johnson's Adm'r*, 9 W. Va. 434; *Hyman, Moses & Co. v. Smith et al.*, 10 W. Va. 298.

⁴ *Tyler v. Simmons*, 6 Paige, 127; *Herrick v. Belknap*, 27 Vt. 695; *Douglas v. Merceles*, 24 N. J. Eq. 25; *Foster's Federal Practice*, § 315. See "Correcting Errors in Procedure," *ante*, §§ 427-431.

§ 440. When exceptions unnecessary — Continued — Error in computation.— Another exception to the rule requiring exceptions and objections to a master's report is where the master has made a mistake or miscalculation in accounts. Errors apparent in the schedules have been corrected even after enrollment on a summary application. Therefore it has often been held that errors in computation, not affecting the result materially, may be corrected at any time either before or after the confirmation of the report.¹ Thus, where a master fails to allow interest to a party entitled to it under the law, the error may be corrected by the chancellor, or on appeal, without any exception being taken.²

It will be seen that one principle runs through all these cases, namely, *the error appears on the face of the report*. On the same principle, errors in figures may be corrected even after the enrollment of the decree, provided the errors appear upon the face of the report or decree.³ In *Weston v. Haggerston*⁴ the master, in carrying forward balances from page to page of his report, made a mistake of several thousand pounds. This report was confirmed, and a decree enrolled directing the payment of the amount so erroneously found to be due. Upon application to correct this error Lord Eldon held that as to any error in charge or discharge appearing on the report it might be corrected, but that it would be improper to send it back to the master to inquire into errors appearing on the face of his report. It follows as a matter of course that if, in order to correct a mistake, it is necessary to bring the matter before the court by affidavit, the proper course is by bill of review,⁵ or if the decree has not been enrolled, then by a supplemental bill in the nature of a bill of review.⁶ In this country a decree is considered as enrolled when the court by which it was rendered has adjourned for the term.⁷

¹ *Howe v. Russell*, 36 Me. 115, 127; *Mason v. Crosby*, 3 W. & M. 258; 2 Madd. Ch. Pr. 258; *Utica Ins. Co. v. Lynch*, 2 Barb. Ch. 573; *Bogert v. Furman*, 10 Paige, 496; *Crossman v. Card*, 143 Mass. 152, 9 N. E. 514; *Weston v. Haggertson*, Coop. 134; *Adams v. Claxton*, 6 Ves. 226.

² *Steele v. Frierson*, 85 Tenn. 430, 437.

³ *Brookfield v. Bradley*, 2 Sim. & Stu. 65.

⁴ Coop. 134.

⁵ *Maddock*, Ch. Pr. (ed. 1837), vol. 2, 709; *Story*, Eq. Pl., § 403; 2 Ency. Pl. & Pr. 570.

⁶ *Maddock*, Ch. Pr., vol. 2 (ed. 1837), 710; *Standish v. Radley*, 2 Atk. 177; *Gartside v. Isherwood*, 2 Dick. 613, 614.

⁷ 2 Ency. Pl. & Pr. 570, cases cited.

§ 441. When exceptions are unnecessary — Continued —
Where facts are admitted.— The facts being admitted, the only question being as to whether the conclusions of the master are proper or not, no exceptions are necessary.¹ When facts are uncontroverted and the question is whether the conclusion of law is correct or not, no exceptions are necessary.² In Maryland it has been held that it is not necessary to file exceptions to an auditor's account in order to raise objections thereto. When accounts are stated to represent the views and claims of the parties to the cause, under their instructions, no exceptions are required by either party, and objections may still be taken in the court of appeals. Such an account, brought into the cause with other accounts presenting different views of the conflicting claims of the parties, does not require exceptions to be filed to it.³

§ 442. When exceptions unnecessary — Continued —
Report in conflict with order.— Where the master disregards the directions of the court in the order of reference, and makes a report inconsistent therewith, or where the report does not furnish the facts necessary to enable the court to proceed to a final decree on the merits, the chancellor should not permit it to stand. A report which is obnoxious to either of these objections does not require exceptions to set it aside.⁴ If the master fails to report on a matter referred to him, the court will, without exceptions being taken, recommit the matter to him, as "no one's right can be regarded as abandoned or prejudiced by failure to except to such a report."⁵ It is not proper for the master to state results without processes by which they were ascertained. This is an improper method of stating an

in note 1; Story, Eq. Pl., § 408; Craddock v. Owen, 2 Sm. & G. 241; Richardson v. Ward, 13 Beav. 110; Ellis v. Maxwell, id. 287.

¹ Burke v. Davis, 53 U. S. App. 414, 420, citing Daniell, Ch. Pr. 1810, and Hayes v. Hammond, 162 Ill. 133, 44 N. E. 422.

² Hayes v. Hammond, 162 Ill. 135, 44 N. E. 422; Von Tobel v. Ostrander, 158 Ill. 499, 504, 42 N. E. 152; Kings-

bury v. Kingsbury, 20 Mich. 212, 214; Adams v. Claxton, 6 Ves. 226.

³ Wells v. Beall, 2 G. & J. 458, 467.

⁴ Lang v. Brown, 21 Ala. 179, 56 Am. Dec. 244, 248.

⁵ Childs v. Hurd, 32 W. Va. 66, 68, 104, 9 S. E. 362; King v. Burdett, 44 W. Va. 561, 29 S. E. 1010; Lang v. Brown, 21 Ala. 179; Eaton v. Truesdail, 40 Mich. 15; Levert v. Redwood, 9 Port. (Ala.) 79, 94; Clark v. Willoughby, 1 Barb. Ch. 68, 71.

account, and one so rendered ought to be rejected by the court *ex mero motu*, or on an objection made by either party.¹

It is always improper to ask the master, through the form of an objection, to disregard or find against the order of the court, and no exception will be permitted, after the coming in of the report, that attempts to call in question the propriety of such order. If the order is wrong the proper method of rectifying it is by motion to set it aside or modify it, and not to attack it, indirectly, by an exception. The same is true of directions given by the court subsequent to the order of reference. Thus, where the chancellor sustains exceptions to the report of the master at a particular point and re-refers the cause to a master, with instructions, upon the coming in of the second report it is not necessary to again except to the findings. The act of the master in changing his report is virtually the act of the chancellor. It would be a contempt on the part of the master to disregard the instructions of the chancellor, and it would hardly be respectful on the part of counsel to renew a contest before the chancellor by again excepting.²

In Maryland it has been held that no exceptions are necessary where the rights of the parties have been adjudicated by the court, and the auditor in stating his account merely exhibits a statement of those rights as adjudicated. Thus, where the proceeds of a sale of property were directed by the court to be applied in a certain manner, and the auditor stated an account in conformity with the order, which account was finally ratified, the account was open for review on appeal, although no exceptions had been filed. It was said in this case that it would have been disrespectful to file exceptions to such an account, as all controversy had been settled by the order of court determining the manner in which the proceeds of sale should be applied.³ Where an exception is properly taken to a finding in a master's report, exception sustained, and the matter referred again to the master with directions to modify his report in that regard, if the master fails to

¹ O'Neill v. Perryman, 102 Ala. 522, 532, 365, 380; Stokes v. Detrick, 75 Md. 256, 267, 23 Atl. 846. See also Cher-

² Harbin v. Bell, 54 Ala. 389, 392; Moore v. Randolph, 70 Ala. 575, 586. 28 Atl. 894; Miller, Equity Procedure,

³ Gardiner v. Hardey, 12 G. & J. sec. 837, 546.

obey the directions of the report, but, in lieu thereof, reports the facts to the court, the latter may correct the report without further exception, "so as to make the final decree consistent with the prior order."¹

§ 443. **Failure to except — Admits what.**— Each and every finding of fact made by the master, and not objected to, is thereby admitted to be correct. To raise a question as to the correctness of such finding, an objection must be taken before the master and this must be followed by a corresponding exception in the trial court. Unless this is done such finding is conclusive on appeal.² In another case the supreme court of Illinois say: It is well settled that where matters of fact are referred to a master for his determination, it is the duty of the parties, when notified, to appear before him and there contest the matter, and if his findings are not, in their judgment, supported by the evidence, it is their duty to interpose their objections, so as to afford the master an opportunity to modify his report if it should happen to be wrong; and if in such case, after hearing the objections, the master declines to modify or change his report, it is the duty of the objecting parties, after it has been filed in court, to appear there and file exceptions to it; and when this course has not been pursued and no sufficient reason is assigned for not doing so, the report of the master, when approved by the court, will be deemed conclusive upon questions covered by it.³

A failure to except to the findings of a master is equivalent to an admission as to their correctness.⁴ If a report is not objected to it is taken as correct, and upon a motion for that pur-

¹ Lippincott v. Bechtold, 54 N. J. Eq. 407, 34 Atl. 1079.

² Shaffner v. Appleman, 170 Ill. 281, 48 N. E. 978.

³ Jewell v. Rock River Paper Co., 101 Ill. 57, 68, citing Hurd v. Goodrich, 59 Ill. 450; Pennell v. Lamar Ins. Co., 73 Ill. 303.

⁴ National Commercial Bank v. McDonnell, 92 Ala. 387, 9 So. 149; Waldrop v. Carnes, 62 Ala. 374; Singer v. Steele, 125 Ill. 426, 17 N. E. 761; Patterson v. Robinson, 116 N. Y. 193, 198; Brush v. Lee, 36 N. Y. 49;

Gidley v. Bidley, 65 N. Y. 169; Wilkes v. Rogers, 6 Johns. (N. Y.) 566; Story v. Livingston, 18 Pet. 359; O'Reilly v. Brady, 28 Ala. 530; Smalley v. Corliss, 37 Vt. 486; National Bank v. Sprague, 23 N. J. Eq. 81; Ransom v. Winn, 18 How. (U. S.) 295; Chapman v. Pittsburgh, etc. R. Co., 18 W. Va. 184; White v. Hampton, 10 Iowa, 238; Jewett v. Rock River Paper Co., 101 Ill. 57; Brockett v. Brockett, 3 How. (U. S.) 691; Kinsman v. Parkhurst, 18 How. (U. S.) 282.

pose it will be confirmed as of course.¹ This rule applies at least to adults.² This is the rule in jurisdictions where parties are required to file objections with the master as a basis for exceptions afterward to be taken. In such jurisdictions every conclusion, every finding not objected to and afterward excepted to, is admitted to be correct; such failure to object indicating that the parties were satisfied therewith.³

In other jurisdictions, where no objections are required to be filed with the master, exceptions must be taken after the coming in of the report, or the findings of the master must be confirmed. The master's report is conclusive as to all matters not excepted to. If, in the opinion of a party, evidence introduced before the master is incompetent or insufficient to establish a claim, it is his duty to file objections before the master, and, if overruled, renew such objections as exceptions in the trial court, and, failing to do so, the master's findings are conclusive.⁴ A party dissatisfied with the findings of a master must make distinct exceptions, so the court can readily understand what matters are in issue between the parties, otherwise it will be understood that he acquiesces in such findings.⁵ "It is my opinion," said Spencer, J., in *Wilkes v. Rogers*,⁶ "that a court of chancery cannot set aside a report on exceptions not taken, and require further proof, when the parties, whose interests would excite them to make every possible objection, are satisfied." Therefore, a report of a master not excepted to must be taken to be true.⁷ In Georgia it is provided by the code

¹ 2 Maddock's Ch. Prac. (ed. 1837) 681; *Da Costa v. Da Costa*, 3 P. Wms. 140; *Jaffrey v. Brown*, 29 Fed. 476, 480.

² *Wilkes v. Rogers*, 6 Johns. 591; *Story v. Livingston*, 13 Peters, 359. See also *Wyatt v. Thompson*, 10 W. Va. 645; *Laidley v. Kline*, 8 W. Va. 218; 2 Barton's Ch. Pr. 647.

³ *Pennell v. Lamar Ins. Co.*, 73 Ill. 303; *Cheltenham Improvement Co. v. Whitehead*, 128 Ill. 279, 284, 285, 21 N. E. 569; *Singer v. Steele*, 125 Ill. 426, 429, 17 N. E. 761; *McClay v. Norris*, 4 Gilm. 370; *Brockman v. Aulger*, 12 Ill. 277; *Hurd v. Goodrich*, 59 Ill. 450; *Clark v. Laughlin*, 62 Ill.

278; *Prince v. Cutler*, 69 Ill. 267, 128 Ill. 279; *Jewell v. Paper Co.*, 101 Ill. 57; *M. E. Church v. Jaques*, 3 Johns. Ch. 77; *Snell v. De Land*, 136 Ill. 533, 138 id. 55, 63, 27 N. E. 183; *Coffeen v. Thomas*, 65 Ill. App. 117.

⁴ *Gehrke v. Gehrke*, 190 Ill. 166, 175, 60 N. E. 59; *Whittemore v. Fisher*, 132 Ill. 243, 255, 24 N. E. 636; *Hurd v. Goodrich*, 59 Ill. 450, 455.

⁵ *Foster v. Van Ostern*, 72 Ill. App. 307, 310; *Singer v. Steele*, 125 Ill. 426, 429, 17 N. E. 761.

⁶ 6 Johns. 566, 591.

⁷ *Da Costa v. Da Costa*, 3 Peere Wms. 140.

that if the report is not excepted to the court shall frame a verdict or decree thereon, as may be proper.¹

Parts of a report not excepted to are admitted to be correct, not only as regards principles, but also as relates to the evidence on which they are founded.² A party may at any time abandon his exceptions to a master's report, and under United States Equity Rule 83 the report will stand confirmed in one month after such withdrawal.³ So, too, he may, at any time, withdraw such exceptions, and by such withdrawal the correctness of such findings is admitted.⁴ Such abandonment or withdrawal leaves the case precisely as if no exceptions had ever been taken. If no objections to the report are filed before the master, an order entered by the chancellor "that the objections filed before the master stand as exceptions to the report" is futile, because there is nothing to which the order can apply.⁵

§ 444. Time of filing.—In all cases where a dissatisfied party desires to contest a matter in which exceptions are necessary, counsel should see that his exceptions are filed in time. The time in which such exceptions must be filed is regulated either by the general practice in courts of chancery, or the time may be limited by a rule of court, or by statute. In case there is no rule of court or statutory provision controlling the manner, the regular time for excepting to a master's report, where it requires confirmation, is before it is confirmed absolutely; but there are instances where the court has permitted exceptions to be filed after the confirmation of the master's report.⁶

¹ Code, sec. 4601.

² *Thompson v. Catlett*, 24 W. Va. 524, 540; *Perkins v. Saunders*, 2 Hen. & M. 420; *Wyatt v. Thompson*, 10 W. Va. 645; *Smith v. Smith*, 4 Johns. Ch. 445; *Hyman v. Smith*, 10 W. Va. 298; *Baxter v. Blodgett*, 68 Vt. 629, 22 Atl. 625; *Scofield v. Stoddard*, 58 Vt. 290, 5 Atl. 314; *Chapman v. Chalfant*, 14 W. Va. 531; *Appeal of Dickey* (Pa.), 7 Atl. 577; *Ward v. Ward*, 21 W. Va. 262; *Singer v. Steele*, 125 Ill. 426, 17 N. E. 761; *Wilkes v. Rodgers*, 6 Johns. 566; *Smalley v. Corliss*, 37

Vt. 486; *O'Reilly v. Brady*, 28 Ala. 530; *Himely v. Rose*, 5 Cranch, 318; *Shipman v. Fletcher*, 83 Va. 349, 3 S. E. 198.

³ *Gasquet v. Crescent City Brewing Co.*, 49 Fed. 493.

⁴ *Waldrop v. Carnes*, 62 Ala. 374.

⁵ *Lebkeuchner v. Moore*, 88 Ill. App. 16.

⁶ 1 Newl. Ch. Pr. 346; *Turner v. Turner*, 1 Dick. 313; *Allen v. Allen*, id. 362; *Turner v. Turner*, 1 Swanst. 154.

United States Equity Rule 83 provides that "the parties shall have one month from the time of filing the report to file exceptions thereto; and, if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule-day after the month is expired." The term "month," as used in the federal rule, limiting the time to file exceptions, means a calendar month and not a lunar month.¹ In the federal courts the month allowed by rule for filing exceptions to the report of the master does not begin to run until the report is filed in the clerk's office. And where the report as filed is so incomplete that a final decree cannot be made on it, and, to avoid a recommittal, the parties by stipulation supply the facts necessary to complete it, such stipulation takes the place of a further report. Until the complete report was filed, "or something equal to it," the month allowed for filing exceptions did not begin to run.² This equity rule has no application to a report of sale made by a master.³

In Arkansas all questions as to the correctness of the master's report or of his rulings made during the progress of a reference are raised by objections and exceptions made during the hearing, which the master, upon request, is required to state in his report. Under the statute evidence is taken in writing and returned with his report into court.⁴ After his report is filed the parties have four days to file exceptions to the same. The section relative to exceptions is as follows: "Exceptions may be allowed to the master's report where he admitted incompetent testimony, or where he excluded competent testimony, or for any other cause which may be adjudged good by the court, or when it shall be apparent from the face of the report that injustice has been done."⁵

In Pennsylvania it is provided by a supreme court equity rule that, where exceptions to the findings of a referee have been filed with him and returned into court with his findings, the party so excepting may at any time within ten days take exceptions to the action of the referee, and that "the case shall

¹ Gasquet v. Crescent City Brewing Co., 49 Fed. 493.

² Bridges v. Sheldon, 7 Fed. 17, 36.

³ Pewabic Min. Co. v. Mason, 145 U. S. 349, 12 Sup. Ct. R. 887.

⁴ Sandel & Hill's Digest, Code, § 5956; Roberts v. Totten, 18 Ark. 608, 618.

⁵ Id., § 5960.

thereupon be placed upon the equity argument list next to be heard in said court, and the exceptions heard by the court or judge acting as chancellor in the case, and disposed of; whereupon the proper decree shall be made and entered, subject to the right of appeal to the supreme court, as provided by law."¹ By Chancery Rule No. 95, in Alabama, it is provided that: "Reports of the register, read in open court on one day, may be confirmed the next, unless excepted to." It is further provided that: "The chancellor may extend the time for excepting to reports, and for hearing exceptions, to such day or days as he may deem proper." In Georgia it is provided by the Code, section 4589, that "within twenty days after the report is filed and such notice given, either party may file exceptions, to be separately classified as 'exceptions of law,' and 'exceptions of fact.'"

§ 445. Time of filing — Continued.— Where the court has by an order limited the time for filing exceptions to a master's report and that time has expired, exceptions cannot be thereafter filed except by leave of court upon good cause shown.² When exceptions have not been filed within the time allowed for that purpose, it is within the discretion of the court to permit them to be filed thereafter upon proper cause shown.³ Where a party desiring to file exceptions to a master's report fails to file the same within the time limited by rule, because of an agreement between his solicitor and the solicitor of the complainant, such exceptions may, in the discretion of the court, be afterwards filed and argument heard thereon, notwithstanding his laches.⁴ Application for leave to file exceptions after the time has expired for so doing must be seasonably made, or a reasonable excuse made for delay, as well as for failure to comply with the rule.⁵ Such motion must be accompanied with proof of the facts constituting an equity which would take the case out of the rule.⁶

¹ 1 Brewster, Eq. Pr., § 5177.

N. J. Eq. 166; Miller v. Miller, 26 N. J. Eq. 423.

² Cook v. Com'rs of Houston County, 62 Ga. 224, 228; Suttles v. Smith, 75 Ga. 830, 833; Lane v. Macon & Atl. Ry. Co., 96 Ga. 630, 644, 24 S. E. 157.

⁴ Hoppock's Ex'rs v. Ramsey, 28 N. J. Eq. 166.

⁵ Cook v. Com'rs of Houston County, 62 Ga. 223; Burnett v. State, 87 Ga. 622, 13 S. E. 552.

³ Stewart v. Crane, 87 Ga. 328, 13 S. E. 552; Hoppock v. Ramsey, 28

⁶ See Foster v. Van Ranst, 1 Hill's

Parties will not be permitted by unreasonable delay to protract litigation; hence where delay has occurred, some reasonable excuse must be shown to the court or leave to file exceptions will be denied.¹ The chancellor should not arbitrarily allow new and distinct exceptions to be filed after the expiration of the time originally limited.² An exception filed after the argument and decision of the court in the cause will not generally be considered by the court in the case. Where the report was returned October 11, 1838, and the exception was not made until April 24, 1845, and not until the case had been heard without objection, had been argued by counsel, and the opinion of the court pronounced against the parties excepting, the exception was disregarded.³ But an exception may be filed even after confirmation of the report where to do otherwise would work injustice.⁴ In Georgia, however, a statutory provision limiting the time for filing exceptions received a harsh construction in a recent case. The code provides that exceptions are to be filed within twenty days after notice of filing the report, and it is held that this law makes no provision for extending the time in the event counsel is prevented by providential cause from filing exceptions within the time named, and in the absence of a provision to this effect, that the court had no authority to allow exceptions to be filed after the expiration of the twenty days.⁵ It was therefore held that the fact that counsel was "taken violently, suddenly and unexpectedly sick" was no excuse for failure to file the exceptions within the time limited.⁶ Where a party files objections not within the time limited, and no objection is made, the default is waived.⁷

Eq. 185; *Gasquet v. Crescent City Brewing Co.*, 49 Fed. 493; *Slee v. Bloom*, 7 Johns. Ch. 187; *Seigle v. Seigle*, 86 N. J. Eq. 397; 2 *Daniell's Ch. Pr.* (5th ed.) 1313, 1314; *Potts v. Potter*, 2 Dev. Ch. 281.

¹ *Cook v. Com'rs of Houston County*, 62 Ga. 224, 228; *Suttles v. Smith*, 75 Ga. 830, 833; *Lane v. Macon & Atl. Ry. Co.*, 96 Ga. 630, 644, 24 S. E. 157.

² *Arthur v. Gordon Co.*, 67 Ga. 220; *Suttles v. Smith*, 75 Ga. 830, 833; *Lane v. Macon & Atl. Ry. Co.*, 96 Ga. 630, 644, 24 S. E. 157.

³ *Miller v. Holcomb's Ex'r et al.*, 9 Grat. 667; *Chapman's Adm'r v. Shepherd's Adm'r et al.*, 24 Grat. 377.

⁴ *Wooding v. Bradley*, 76 Va. 614.

⁵ *Littleton & Lamar v. Patton & Co.*, 112 Ga. 430, 442, 37 S. E. 755.

⁶ *Id.*

⁷ *Ex parte Jordan*, 94 U. S. 248; *Bryant v. McCollum*, 4 Heisk. 511. For local rule as to extending time for filing exceptions in Rhode Island, see *Clapp v. Sherman*, 17 Atl. 180.

§ 446. Grounds of exceptions.— The dividing line between matters which must be reached by exceptions and those which can only be raised by a motion or petition is not sharply defined. On principle the rule is easily stated as follows: If a party desires to contest a finding upon matters submitted to the master, he must do so by an exception; but if he desires to question a ruling of the master in a matter which, if wrong, amounts to only an irregularity or an error in procedure, he should do so by motion or petition. This subject has been fully discussed in a previous section;¹ but some additional suggestions will be offered in this connection.

First. It is clearly settled that, if a party seeks to question a conclusion of fact reported by the master, he must do so by exception and not by motion. The rule may be stated thus: The province of exceptions to the report of a master is to call in question the conclusion to which he has come upon the subjects referred to him.² That is, exceptions to a master's report are only proper when he has made an erroneous decision upon the matters referred to him,³ and must be to the conclusions, holdings or findings of the master, and not to the evidence.⁴

Second. Such an exception may be upon the ground that the conclusion is not supported by the evidence or it may be that the conclusion is not warranted by the pleadings. If a party excepts to the findings of the master on the ground that they are not warranted by the averments of the bill, or, in other words, that the *allegata* and *probata* do not correspond, he must point out specifically in what the alleged variance consists, and thus allow an amendment of the bill if desired.⁵

Third. Such exception can only be taken to a material holding or conclusion of the master.

An exception to a master's report on the ground that the master failed to find a certain immaterial fact must be overruled.⁶ Where a party excepts to an immaterial finding of

¹ See "Irregularities in Proceedings — How Corrected," *ante*, §§ 313-323; also *ante*, §§ 427-431.

² *Douglas v. Merceles*, 24 N. J. Eq. 25, 26; *Weber v. Weitling*, 18 N. J. Eq. 39; *Tyler v. Simmons*, 6 Paige, 127.

³ *Taylor v. Robertson*, 27 Fed. 537.

⁴ *Friedman v. Schoengen*, 59 Ill. App. 377.

⁵ *Thornton v. Commonwealth Loan Ass'n*, 181 Ill. 456, 458, 459, 54 N. E. 1037.

⁶ *Dierks v. Com'rs of Highways*, 142 Ill. 197, 205, 31 N. E. 496; *Anderson v. Moore*, 145 Ill. 61, 67, 33 N. E. 848.

the master he will not be heard to complain because his exception is overruled.¹ That is, a party complaining of an alleged error must show that it is a material one, that is, one affecting him injuriously. Thus, the fact that the master admitted evidence upon an immaterial issue is no ground for setting aside his report, if the objecting party is not injured thereby;² or, if an exception to the report of a master shows merely that a question to the witness was excluded, and the materiality of the question does not appear in the record, the exception will be overruled.³ So, too, an exception, it is said, will not lie to the master's report for inserting therein impertinent matter.⁴

Fourth. Again, it is said that exceptions must relate to something which appears on the face of the report;⁵ and that an exception to a matter not shown upon the face of the master's report is a nullity.⁶

A speaking demurrer is clearly bad, and speaking exceptions must be equally so and for the same reason. The court cannot go outside of the record to act upon them.⁷ Thus an exception cannot be taken on the ground that the master had expressed feelings of hostility to a party and was not impartial, but must be to something shown by the report.⁸ When an exception is based on a charge that the master erred as to a matter of fact, and the master's report is silent in that regard, the exception must be overruled, because the court, unless the contrary is shown, will assume that the course of the master was regular and proper. Exceptions are taken to his findings of fact, and, if the finding of fact does not appear by the report, there is nothing to except to, and such exception must be overruled.⁹

¹ Herbert v. Herbert, 144 Ill. 115, 33 N. E. 19; Dierks v. Com'rs of Highways, 142 Ill. 197, 31 N. E. 496.

² Tripp v. Forsaith Mach. Co., 69 N. H. 233, 235, 45 Atl. 746.

³ Fletcher v. Reed, 131 Mass. 312.

⁴ Rufford v. Bishop, 5 Russ. 360, 1 Hoffman, Ch. Pr. 545.

⁵ Pearson v. Darrington, 32 Ala. 227, 238; Rennell v. Kimball, 5 Allen, 356.

⁶ Ferguson v. Collins, 8 Ark. 241, 249.

⁷ Goddard v. Cox, 1 Lea, 113; Childress v. Harrison, 1 Baxt. 410. See also Myers v. James, 4 Lea, 370, 372; Musgrove v. Lusk, 2 Tenn. Ch. 576, 578.

⁸ State v. McIntyre, 53 Me. 214.

⁹ De Mott v. Benson, 4 Edw. Ch. 297.

So, too, for the same reason, exception will not lie on the ground that the master made an erroneous ruling as to costs,¹ but the proper course is for the dissatisfied party to proceed by petition. Lord Chancellor Thurlow said: "An exception had never been admitted for costs only; that the regular method was to state the articles the party meant to object to in a petition, and pray leave to except."² This was a case where a decree had been entered in which it was ordered that plaintiff pay a certain part of the costs, and it was referred to the master to ascertain the amount.³

§ 447. *Grounds of exceptions—Continued.*—In Georgia, however, it is provided by the Code, sec. 4590, that "exceptions as to any matter not appearing on the face of the record, brief of evidence, or in the report itself, shall be certified to be true by the auditor within thirty days after the report is filed;" and it was also there held that a motion to recommit the report of a master for "indefiniteness, omissions, errors of calculation, failure to report evidence, errors of law, or other proper cause" was nothing more nor less than an exception to the report, and that the law would not authorize what is really an exception to be taken advantage of, by calling up a motion to recommit, after the time for filing exceptions has expired,⁴ and in that state it is held that the court will not consider exceptions on the ground of error in the ruling out of evidence by the master, unless the exception itself sets out such evidence or the substance of it.⁵

Fifth. Exceptions must be to the findings of the master and not to the reasons given in support of such findings. The question is: Are the findings of the master correct, not whether he gives a good or bad reason in support thereof. The rule is analogous to that applied by the supreme court where it is called upon to review the findings of an inferior court. Assignments of error must be upon the findings or

¹ Lucas v. Temple, 9 Ves. 299.

² Pitt v. Mackreth, 3 Brown, 321.

³ See also Lucas v. Temple, 9 Ves. 299; Purcell v. McNamara, 12 Ves. 170, 171; 2 Smith, Ch. Pr. (Am. ed.) 368, 369; 2 Madd. Ch. Pr. (4th Am. ed.) 510.

⁴ Littleton & Lamar v. Patton & Co., 112 Ga. 438, 442, 37 S. E. 755.

⁵ Rodgers v. Stern & Co., 112 Ga. 624, 626, 37 S. E. 877; Torras v. Raeburn, 108 Ga. 345, 33 S. E. 989 and cases there cited.

orders of the court and not upon the reasons given by the lower court in support of same.¹ The finding may be correct and yet the reason given by the master why he came to the conclusion may be bad. The fact that the master came to a correct conclusion, either as to the facts or the law, by an incorrect process of reasoning is wholly immaterial. Such an exception should of course be overruled.²

Sixth. Exceptions will not lie on the ground that the master refused to do a thing which the court ordered him not to do. A party has no right to ask the master to disobey an express mandate of the court.³ But if the trial court erroneously directs the master not to consider a matter it is ground for reversal on appeal.⁴

Seventh. Thus far we have pretty clear sailing, but we come again to the mooted question; that is, whether erroneous rulings made by the master during the progress of a hearing can be corrected by exceptions, or whether they must be corrected on motion or petition. It has been repeatedly said by both the courts and text writers that exceptions will not lie under such circumstances. For example, it is said that if a party against whom a report is irregularly made wishes to set it aside and send it back to the master to correct the irregularity, he should, instead of excepting to the report, get an order to enlarge the time for excepting;⁵ and in the meantime apply to the court to set aside the report for the irregularity, or to have the report referred back again to the master for further proceedings before him, such as to hear further testimony, where a proper foundation is laid for such course. If the proceedings before the master have been irregular, or the master has neglected to decide and report as to any matter which he was

¹ Christy v. Stafford, 123 Ill. 463, 466, 14 N. E. 680; Dunham Towing and Wrecking Co. v. Dandelin, 143 Ill. 409, 416, 32 N. E. 258; Ohio & M. Ry. Co. v. Wangelin, 152 Ill. 138, 38 N. E. 760; Columbus Safe Deposit Co. v. Burke, 60 U. S. App. 253, 259; Russell v. Kern, 34 U. S. App. 90; Caverly's Adm'r v. Deere & Co., 24 U. S. App. 617, 630; Campbell v. Powers, 139 Ill. 128, 135, 28 N. E. 1062.

² Campbell v. Powers, 139 Ill. 128,

135, 28 N. E. 1062; Sullivan v. Iron Silver Mining Co., 148 U. S. 431, 12 Sup. Ct. R. 555; Reeside v. Reeside, 6 Phila. 507, 510.

³ Jenkins v. Bauer, 8 Ill. App. 634, 649.

⁴ Jenkins v. International Bank, 97 Ill. 568, 575.

⁵ This order enlarging the time for excepting to the report is only necessary where the time for excepting is limited by a rule of court.

by the order of reference directed to ascertain and report upon, the proper course for the party aggrieved is to make a special application to the court to set aside the report for such irregularity or to refer the case back to the master with directions to make further report upon the matters originally referred to him for his examination and decision.¹ Such irregularity cannot be corrected on filing exceptions, as this is "not the proper form of correcting irregularities before the master, as exceptions to a report are only proper where the master has come to an erroneous conclusion upon some matter referred to him to ascertain and decide, and to report upon, as the immediate subject of the reference."²

§ 448. Grounds of exceptions — Continued.— Where a master for any reason fails to discharge the duty devolving upon him under the order of reference, such as refusal to adjourn a hearing to enable a party to produce further testimony, or fails to report on matters referred to him, the proper method of bringing the matter before the court is not by exceptions but by motion to re-refer.³ When the master has erroneously refused to receive testimony, the way to correct the error is by a motion to the court for an order requiring him to receive it, and not by exceptions to the report;⁴ and in another case it is held that exception to the admission or exclusion of evidence, taken upon the hearing before the master, need not be restated in the exceptions filed to his report.⁵ Again it is held that a party cannot except to the report and at the same time sustain a motion to re-refer it to the master on the ground of irregularity; the two positions are incompatible and entirely inconsistent with each other. The filing of exceptions to the report of a master necessarily presupposes that the report

¹ Tyler v. Simmons, 6 Paige, 127, 130-131. 59 Ill. App. 426; Brewster, Eq. Pr. of Pa., § 6028; Gibson's Tenn. Ch. Pr., § 597; 2 Daniell, Ch. Pr. (6th Am. ed.) 1309; Foster's Fed. Pr. 315.

² Tyler v. Simmons, 6 Paige, 127, 129-131; Rufford v. Bishop, 5 Russ. 346; Douglas v. Merceles, 24 N. J. Eq. 25; Miller's Adm'r v. Miller, 26 N. J. Eq. 423; Emerson v. Atwater, 12 Mich. 314; Schwarz v. Sears, Walk. Ch. (Mich.) 19; Ward v. Jewett, id. 46; McMannomy v. Walker, 63 Ill. App. 259, 277; Deimel v. Parker, 25.

³ Douglas v. Merceles, 24 N. J. Eq. 25. ⁴ Ward v. Jewett, Walk. Ch. (Mich.) 45; Celluloid Mfg. Co. v. Cellonite Mfg. Co., 40 Fed. 476.

⁵ Marks v. Fox, 18 Fed. 713; Foster, Federal Practice, § 315.

is regularly made, but that the master has come to a wrong conclusion as to the whole or some of the matters referred to him. Exceptions to a report are only proper where the master has come to an erroneous conclusion upon some matter referred to him to ascertain and decide, and to report upon, as the immediate subject of the reference. The filing of exceptions after notice of an irregularity is, as we have already seen, a waiver of such irregularity; as the latter can only be corrected by a motion to set aside the report on that ground, or to re-refer it to the master for correction.¹

But in other cases we find the courts very improperly, as we think, allowing parties to question the irregularity of proceedings in the master's office by exceptions. For example, it is said in one case that a finding upon a matter not referred is erroneous and subject to exception.² This is apparently the proper practice in Vermont.³ And in an Alabama case the court say that objections to testimony, and other matters relative to the taking of the account, must be raised by exceptions to the master's report;⁴ and in another case in the same state it is said that a party cannot, under an exception to the allowance of an item in a master's report, avail himself of an objection to the competency of evidence admitted in support of such item; but, if such evidence is improper, objection must be made at the time it is offered; whereupon, if the master makes an improper ruling, it will form the basis of an exception.⁵ There is doubt, however, as to what the courts really mean by the word "exceptions" in some of these cases. To raise a question as to the competency of evidence some of the courts hold that an exception must be taken to the ruling of the master at the time such ruling is made. Such an exception has no relation to an exception taken to the action of the master upon the coming in of his report. We have already seen⁶ that where exceptions relate to the competency of evi-

¹ Tyler v. Simmons, 6 Paige, 127, 180-181.

² Taylor v. Robertson, 27 Fed. 537.

³ Graham v. Stiles, 38 Vt. 578; Wilder v. Stanley, 49 Vt. 105; Manning v. Leighton, 66 Vt. 56, 28 Atl. 630; Baxter v. Blodgett, 63 Vt. 629, 22 Atl. 625; Graham v. Stiles, 38 Vt.

578; Bruce v. Life Ins. Co., 58 Vt. 253, 2 Atl. 710; Hard v. Burtin, 62

Vt. 314, 20 Atl. 269.

⁴ Reynolds v. Pharr, 9 Ala. 560.

⁵ Taylor v. Kilgore, 38 Ala. 214, 222.

⁶ See "Irregularities in Proceedings — How Corrected," *ante*, §§ 313-323.

dence it must appear that objection was properly taken at the time the evidence was offered, and if not, such objection will be overruled. It is only by making an objection at the time the evidence is offered, and by so doing procuring a ruling of the master thereon, that a party can question the competency of evidence so offered. Such objection and ruling forms the proper basis of the exception, and reserves the question for the revision of the chancellor.¹ Unless objection is made at the time the evidence is offered no question is reserved for the chancellor.² In a former section we noted the loose habit of the courts in using the words "objections" and "exceptions" interchangeably.³

§ 449. **Impertinence — Surplusage — Exceptions for.**—The subject of impertinence, or surplusage, has already been considered in examining the extent of a master's authority under an order of reference,⁴ and, also, in laying down rules for making his report.⁵ It therefore now only remains for us to see how far exceptions will lie upon such grounds, a subject incidentally touched upon in the last section. Exceptions do not lie to a master's report on the ground that it contains surplusage. "Even where the master has introduced into his report matters which are wholly irrelevant to the accounts and inquiries directed by the order of reference, exceptions do not lie to the report on this account. The proper course for the party aggrieved by the introduction of such irrelevant or impertinent matter is to apply to the court directly, by motion, to expunge the impertinent matter; as it would be improper to refer it to one master to review the report of another in this respect."⁶ Daniell says that when the commissioner or master goes beyond the subject referred, or reports irrelevant matter, the practice is not to except but to ask to have the superfluous parts stricken out; but if no application is made, and the report is confirmed, the court will pay no attention to it except so far as it is warranted by the decree.⁷ It is said by the supreme court of Wisconsin that the

¹ Kinsey v. Kinsey, 37 Ala. 393, 396;
Taylor v. Kilgore, 33 Ala. 214, 222.

² Id.

³ See *ante*, §§ 385, 432.

⁴ *Ante*, §§ 165, 166.

⁵ *Ante*, ch. VI, div. 6, "The Master's Report," §§ 390-406.

⁶ Tyler v. Simmons, 6 Paige, 127, 131; Rufford v. Bishop, 5 Russ. 346.

⁷ Daniell, Ch. Pr., vol. 2, p. 1296.

power of the master in a particular case is derived from the order of reference. This power cannot be enlarged nor diminished by consent of parties, yet, if the master exceeds his powers, and takes and reports testimony upon questions not referred to him, the court may, upon the coming in of his report, make its own findings upon such evidence so reported.¹

Where the master considers and reports upon matters not within the order of reference, his report as to such matters would be simply surplusage and would be disregarded; but the fact that a report contains surplusage will not set aside the other parts of the report or sustain an exception. But where a master ascertains and reports upon such matters as a means of arriving at the conclusions which he was required to report, then they are proper to be stated in his report.² But in another New Jersey case it is said that if the master exceeds his authority by investigating and reporting to the court matters not submitted to him by the order of reference or authorized by the pleadings, the court will treat such matters as surplusage, sustain exceptions thereto and strike them from the report.³

The fact that a report of the master contains surplusage constitutes no ground for sustaining an exception to other parts of it, unless it appears from the report that the master "reported upon these matters as a means of arriving at the conclusions which he was required to report."⁴ In other words, where it appears to the court that irrelevant and improper matters influenced the mind of the master in arriving at his conclusions, then such irrelevant matters so considered may not be disregarded as surplusage, but should be considered by the court in determining whether the report will be permitted to stand or not. If it appears, however, that the party now excepting made no objection before the master, but took his chances upon the matter as it stood, and was willing for such irrelevant matter to be considered, provided the master found in his favor, then he is estopped from afterward objecting. It must not be forgotten, too, that if incompetent testimony is

¹ Best v. Pike, 93 Wis. 408, 67 N. W. 697.

² National Bank of the Metropolis v. Sprague, 28 N. J. Eq. 81, 83.

³ Wyokoff, Ex'r, v. Combs, 28 N. J. Eq. 40.

⁴ Bank of Metropolis v. Sprague, 28 N. J. Eq. 81.

admitted against the objection of a party, he is not permitted to insist upon this as error on exceptions to the master's report after it is completed, but he must go at once to the chancellor and have an order entered correcting the error.¹

§ 450. **Must be based on objections.**—“Under correct chancery practice, no exception to a master's report can be heard by the court which was not taken before the master, so that he can reconsider his decision.”² Therefore, strictly speaking, a party will not be permitted to except to a master's report unless he has filed objections with the master, but the court may, if dissatisfied with the report, refer it back to the master to re-examine it, with liberty to the party to make objections thereto.³ In some jurisdictions, as we have already seen, no objections are required to be filed with the master to his draft report.⁴

In a case in the United States circuit court for the eastern district of Louisiana, the rule is well stated as follows:

“The rule of practice is that no exceptions will be heard by the court which have not been made before the master, so as to give him an opportunity of considering the same and correcting his report. But as counsel on both sides have evidently acted under a misapprehension of the rule, I will not overrule the exceptions on that ground, especially as some of them are of great importance to the rights of the parties. But it is desirable that the rule should be observed, and hereafter, in the absence of very special circumstances, the court will feel bound to enforce it. It was declared by the supreme court of the United States in *McMicken v. Perin*, 18 How. (59 U. S.) 507.”⁵ And a recent case in the circuit court of appeals in the fourth circuit squarely held that proper chancery practice requires the above rule to be followed. Afterwards, on petition for rehearing, the decision was re-affirmed.

¹ See *ante*, §§ 818-823, and *ante*, §§ 428-431. In some jurisdictions, however, as in the federal courts, all such questions are reserved until the coming in of the master's report. *Id.*

² *Story v. Livingston*, 13 Pet. 859.

³ *Byington v. Wood*, 1 Paige, 145; *Methodist Episcopal Ch. v. Jaques*, 8 Johns. Ch. 77; *Lewis v. Lewis*, Minor (Ala.), 85; *Colgin v. Cummins*, 1 Por-

ter (Ala.), 148; *Mechanics' Bank v. Bank of New Brunswick*, 8 N. J. Eq. 437; *Gleaves v. Ferguson*, 2 Tenn. Ch. 589; *Gordon v. Lewis*, 2 Sumn. 148.

⁴ See “The Draft Report, and Objections Thereto,” *ante*, § 362 *et seq.*

⁵ *Gaines v. New Orleans* (Circuit Court E. Dist. La.), 1 Woods, 104, Fed. Cas. 5,177.

Judge Simonton, in the opinion, after referring to the rule as laid down by Daniell, cites a number of federal decisions where it is approved, and then adds: "All made after the adoption of rule 83, which it is insisted changed the rule in Daniell." He gives strong reasons for the existence and strict enforcement of the rule as follows: "It is true that in some of the circuits a loose practice has grown up, and exceptions to a master's report are entertained, dealing with facts to which his attention was never called. This practice does not commend itself. It frequently operates a surprise, and it shuts the door to any explanation. It gives room for the display of skill and strategy on the part of ingenious counsel. It may secure success at the expense of right. When there exists a rule of practice inculcated and approved by recognized authority, it should be followed. To prevent misapprehension, it is best to state that we do not require the conclusions of the master on matters of law to be first excepted to before him. But we do require that matters of fact, upon which exceptions to his report are made, be brought to his attention, in order that he might report upon them."¹

§ 451. Must be based on objections — Continued.— The rule in Illinois, which is in accordance with the general practice, following the former English practice, is that, in every case where a party desires to contest an alleged erroneous finding of fact, he must file an objection thereto with the master, and, if such objection is overruled, he must renew it in the form of an exception in the trial court, and, unless each of these steps is taken, the trial court will refuse to review the findings of the master, and, for the same reason, the upper court on appeal will refuse to disturb the decree of the court below.² In a recent case in that state the supreme court again affirms the rule that, as to contested questions of fact, there must be *objections* filed with the master, and these must be renewed in the form of *exceptions* in the trial court, otherwise there is nothing for the court to try, the correctness of the master's findings being admitted. The court say:

"In the case of Jewell v. Rock River Paper Co., 101 Ill. 57, this court said (p. 68): It is well settled that where matters of

¹ Gay Mfg. Co. v. Camp, 13 C. C. A. ² Snell v. De Land, 136 Ill. 533, 537, 137, 140, 65 Fed. 794, 798, 68 Fed. 67. 27 N. E. 833.

fact are referred to a master for his determination, it is the duty of the parties, when notified, as was done here, to appear before him and there contest the matter, and if his findings are not, in their judgment, supported by the evidence, it is their duty to interpose their objections, so as to afford the master an opportunity to modify his report if it should happen to be wrong, and if in such case, after hearing the objections, the master declines to modify or change his report, it is the duty of the objecting parties, after it has been filed in court, to appear there and file exceptions to it; and when this course has not been pursued, and no sufficient reason is assigned for not doing so, as was the case here, the report of the master, when approved by the court, will be deemed in this court conclusive upon the questions covered by it."¹ This course of practice is supported by numerous decisions in that state.²

§ 452. **Must be based on objections — Continued.**—A party will never be allowed to question by exception, or otherwise, the finding of a master depending upon a question of fact, unless he files objections at the proper time.³ This rule of practice is so firmly established in Illinois that it cannot now be seriously questioned. The case of *Strang v. Allen*, 44 Ill. 429, is not an authority to the contrary. There it was expressly held that because of the master's failure to give proper notice of the hearing before him, the parties were excused from filing objections, and, of course, from filing exceptions before the court. Unless good excuse for failing to comply with the well understood rule of practice is shown, it will be enforced in all jurisdictions unless abrogated by rule of court or by statute.⁴ In some of the United States circuits, as above stated, the loose practice prevails of allowing ex-

¹ *Marble v. Thomas*, 178 Ill. 540, 53 N. E. 354. 751; *Whiteside v. Pulliam*, 25 Ill. 285, 288.

² *McClay v. Norris*, 4 Gilm. 370, 386; *Brockman v. Aulger*, 12 Ill. 277, 280; *Hurd v. Goodrich*, 59 Ill. 450, 456; *Prince v. Cutler*, 69 Ill. 267, 271; *Pennell v. Lamar*, 73 Ill. 303, 306; *Brainard v. Hudson*, 103 Ill. 218, 221; *Cheltenham Imp. Co. v. Whitehead*, 128 Ill. 279, 284, 21 N. E. 569; *Singer v. Steele*, 125 Ill. 426, 429, 430, 17 N. E. 48 N. E. 673.

³ *Roby v. Chicago Title & Trust Co.*, 94 Ill. App. 379, 383; *Dates v. Winstanley*, 53 Ill. App. 623; *Burke v. Donovan*, 60 Ill. App. 241, 247; *Lebkuechner v. Moore*, 88 Ill. App. 16; *Kinsella v. Cahn*, 185 Ill. 208, 56 N. E. 1119.

⁴ *Ennesser v. Hudek*, 169 Ill. 494, 48 N. E. 673.

ceptions to be taken to a master's report without requiring objections to be filed with the master to his draft report, under a construction placed upon Equity Rule 83, and, in some of the states, either by a statute or rule of court, a different practice obtains, but the general rule is as above stated.¹ Where the court permits a person to be made a party to a suit after a report has been made by the master, if he desires to contest the findings of the master, the proper course is to re-refer the cause to the master, that he may file objections, and allow the master to pass on the same. Otherwise he will not be permitted to question such findings.²

§ 453. **Must be based on objections — Continued.**— Of course there are numerous exceptions to the rule laid down in the last section. There are many reports which do not require either objections or exceptions to be taken thereto, and there are many cases where, owing to accident, surprise or mistake, the court will permit exceptions to be taken though objections were not filed with the master.³ In case a party by accident or surprise failed to file objections to a master's report, the court may nevertheless permit exceptions to be filed on the hearing, but even in such cases the better practice is to refer the case back to the master to review his report, so that the parties may have an opportunity of there excepting to it.⁴ If, owing to accident, surprise, or any other sufficient excuse, the objections have not been properly taken before the master, the court may, upon an application showing the facts, recommit the report to the master, and allow the dissatisfied party to make and argue the exceptions before him, or may permit the exceptions to be filed as though the objections had been properly taken.⁵

While the courts thus sometimes permit a party to file exceptions, though he should have filed objections to the draft report and failed to do so, yet such liberty is usually reluctantly given, and generally coupled with an admonition to the party

¹ For a full discussion of this subject, see *ante*, ch. VI, div. 4, "The Draft Report — Objections Thereto," § 362 *et seq.*

² *Ottey v. Pensam*, 1 Hare. 322.

³ See "The Draft Report and Objections Thereto," *ante*, § 362 *et seq.*

⁴ *Prince v. Cutler*, 69 Ill. 267, 272; *Gay Mfg. Co. v. Camp*, 13 C. C. A. 137, 140, 65 Fed. 794, 798, 68 Fed. 67.

⁵ *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 40 Fed. 476, 477.

to be more cautious in future. Thus, under peculiar circumstances, the court allowed exceptions to a report to be filed *nunc pro tunc*, but the chancellor said: "I am afraid to tamper with the rules of the court. . . . I desire to be distinctly understood that I allow this under the peculiar circumstances of this case only. No other person need try to do the same. . . . In giving this permission, I am going a great way and I am very reluctant to do it,"¹ and such liberty may be granted upon terms. For example, where a dissatisfied party who has failed to file objections with the master asks that an order of confirmation of the report be set aside, to the end that he may be allowed to except, it is proper for the court, upon the application of the other party, to return the report to the master, with leave to take further testimony upon the subject.² Where the court is dissatisfied with a master's report, it may, on motion, refer it again to the master for review, with liberty to the party to take objection to it.³

§ 454. **Must conform to objections.**—The exceptions, when taken, though not necessarily identical in words, must in substance agree with the objections, and the practice generally is to prepare the objections in the form of the intended exceptions, and, on their disallowance, to convert them into exceptions.⁴ Exceptions are always to be confined to such objections as were allowed or overruled by the master,⁵ and must always correspond with the objections made before the master.⁶ As

¹ *Marjoribanks v. Hovenden*, 8 Ir. Eq. R. 317. See *Fischer v. Hayes*, 16 Fed. 469.

² *Seigle v. Seigle*, 86 N. J. Eq. 397.

³ *Story v. Livingston*, 13 Pet. 359, L. Ed., Book 10, pp. 200, 204. On the general power of the court to direct the review of a master's report, after confirmation, see note to the case of *Turner v. Turner*, 1 Swanst. 154, 156.

⁴ *Adam's Eq.* 383; *McMicken v. Perin*, 18 How. 507; *Troy, etc. v. Corning*, 6 Blatchf. 328, Fed. Cas. 14,196; *Gay Mfg. Co. v. Camp*, 25 U. S. App. 376, 68 Fed. 67; *Gaines v. New Orleans*, 1 Woods, 104, Fed. Cas. 5,177; *Cowdrey v. R. R. Co.*, 1 Woods, 881, Fed. Cas. 3,293; *Copeland v. Crane*,

9 Pick. 78; *Byington v. Wood*, 1 Paige, 145; *Story v. Livingston*, 13 Pet. 359, 366.

⁵ *Hurd v. Goodrich*, 59 Ill. 450, 456; *Prince v. Cutler*, 69 Ill. 267, 271; *Methodist Church v. Jaques*, 8 Johns. Ch. 77, 81; *Byington v. Wood*, 1 Paige, 145; *Remsen v. Remsen*, 2 Johns. Ch. 495, 502; *Troy Iron & Nail Factory v. Corning*, 6 Blatchf. 323, Fed. Cas. 14,196; *Lebkuechner v. Moore*, 88 Ill. App. 16.

⁶ *Huling v. Farwell*, 33 Ill. App. 288, 242; *Hurd v. Goodrich*, 59 Ill. 450, 455; *Prince v. Cutler*, 69 Ill. 267, 271; *Pennell v. Lamar Ins. Co.*, 78 Ill. 808, 806; *Cheltenham Ins. Co. v. Whitehead*, 128 Ill. 279, 284, 21 N. E. 569.

the "exceptions" are in practice but a repetition of the "objections" made before the master, the same principles apply to the "objections." Indeed the practice is usually to stipulate that the "objections" shall be filed as "exceptions."¹ The almost invariable practice, where the draft of the master's report has been objected to, is to convert the objections into exceptions. The rule, which is stated in all the books of practice, is that the party who excepts to the report is bound to make his exceptions correspond with his objections, so that at least they may be the same in substance. The objections being separate, the master is required to and obliged to come to a distinct conclusion as to each one; but where the exceptions are materially different from the objections, the chancellor cannot be sure that he is passing upon the same questions ruled upon by the master.² Yet in a case where there were upwards of thirty objections, all overruled by the master, and the exception was general, being practically that the master erred in "allowing the several sums of money specified in the schedule hereto annexed, whereas he ought to have disallowed the same sums of money or some or one of them, or some part or parts of them, or some or one of them," the vice-chancellor, though hesitating for fear of establishing a precedent, passed upon each objection as if properly excepted to, and sent the case back to the master with further directions.³

"The general, I may say nearly the invariable, practice," says Sir Wigram, vice-chancellor, "where the draft of the master's report has been objected to, is to convert the objections into exceptions. The rule, which is stated in all the books of practice, is that the party who excepts to the report is bound to make his exceptions correspond with his objections, so that at least they may be the same in substance."⁴ In Indiana a party may file additional exceptions after the master's report has been returned into court, notwithstanding he filed objections with the master.⁵

¹ Wolfe v. Bradberry, 140 Ill. 578, & Coll. 114; Moore v. Langford, 6 581, 30 N. E. 665. For form of stipulation and order of court, see *ante*, § 432.

² Ballard v. White, 2 Hare, 158.

³ Id. See Gompertz v. Best, 1 You. Ind. 253, 255.

⁴ Ballard v. White, 2 Hare, 158, 160.

⁵ Bremmerman v. Jennings, 101

§ 455. **Must not be too prolix.**—Another error to be avoided is that of making objections and exceptions too prolix. They “should not be prolix or argumentative, but must state specifically and concisely the findings that are excepted to.”¹ Sometimes attorneys, being in fear of not making their exceptions specific enough, fall into the opposite error of making them unnecessarily prolix. Snyder, Justice, speaking for the court in a West Virginia case, in condemnation of this practice of counsel in making irrelevant and inconsiderate points, and thus unnecessarily taking up the time of the court, says: “Such points and assignments, and the repetition of the same points in various forms, as also what may be termed ‘fishing assignments,’ cannot subserve any good purpose, but are a positive inconvenience to the court and discreditable to counsel.”²

The practice of assigning a great number of objections and exceptions to a master's report or to a decree is one not to be commended. “Counsel throw out a drag-net and ask the court to do the sorting.”³ The rule may be concisely stated as follows: Counsel should only make such objections and exceptions as they intend to rely upon.⁴ Such objections and exceptions stand as assignments of errors, and, for the same reason, should not be prolix.⁵

§ 456. **Must be specific.**—Proper practice in equity requires that exceptions to the report of a master should point out specifically the errors upon which the party relies, not only that the opposite party may be apprised of what he has to meet,

¹ *Hayes v. Hammond*, 162 Ill. 133, 135, 44 N. E. 422.

² *Carskadon v. Minke*, 26 W. Va. 729.

³ *C., R. I. & P. R. R. Co. v. Moffitt*, 75 Ill. 524-529; *Dimes Savings Inst. v. Allentown Bank*, 65 Pa. St. 116-123; *Chicago City Ry. Co. v. Van Vleck*, 40 Ill. App. 367; *Harding v. Sandy*, 43 Ill. App. 442; *Phillips & Colby Const. Co. v. Seymour*, 91 U. S. 646; *Brewster v. Baxter*, 2 Wash. Ty. 135; *Duncan v. Kohler*, 87 Minn. 379, 34 N. W. 594; *Finch v. Karste*, 97 Mich. 20, 56 N. W. 123; *Encyclopedia of Pldg. &*

Prac., vol. 2, 960; *Minchrod v. Ullman*, 60 Ill. App. 400, 403.

⁴ *C., R. I. & P. R. R. Co. v. Moffitt*, 75 Ill. 524-529; *Dimes Savings Inst. v. Allentown Bank*, 65 Pa. St. 116-123; *Chicago City Ry. Co. v. Van Vleck*, 40 Ill. App. 367; *Harding v. Sandy*, 43 Ill. App. 442; *Minchrod et al. v. Ullman et al.*, 60 Ill. App. 400, 163 Ill. 25, 44 N. E. 864; *Phillips & Colby Const. Co. v. Seymour*, 91 U. S. 646; *Brewster v. Baxter*, 2 Wash. Ty. 135; *Duncan v. Kohler*, 87 Minn. 379, 34 N. W. 594; *Encyc. of Pl. & Pr.*, vol. 2, 960.

⁵ *Phillips & Colby Construction Co. v. Seymour*, 91 U. S. 646.

but that the master may know in what particular his report is objectionable, and may have an opportunity of correcting his errors or reconsidering his opinions. Cases are referred to a master, not on account of his assumed superior wisdom, but to economize the time and labor of the court, and as exceptions are usually filed to his report, if they are so general as to require a rehearing of the entire case, there is really nothing saved by a reference.¹ A party complaining of the finding of a master "must put his finger on the point of which he complains." If he does not do so no court of review can regard it. The rules upon this subject are tending rather to increased strictness, and not at all to relaxation. They have their foundation in a just regard to the fair administration of justice, which requires that, when an error is supposed to have been committed, there should be an opportunity to correct it at once, before it has had any consequences; and does not permit a party to lie by without making his objection, and take the chances of success on the grounds on which the judge has placed the cause, and then, if he fails to succeed, avail himself of an objection which, if it had been stated, might have been removed.² To be of any assistance to the court it is necessary for a dissatisfied party to clearly point out the error complained of in the master's report. It is unjust to require a chancellor to go on a hunt for errors through hundreds of pages of testimony. If he is required to do so, a master, no matter how intricate the account, would be of little aid to the court. If to indorse on the report in substance, "The within report is not sustained by the evidence," it puts the burden on the chancellor to examine the whole mass of evidence, and, if such a course is followed, we may as well dispense with masters altogether.³

Hence, exceptions to a master's report must point out specifically the errors upon which the party relies. The object of such definiteness is to give the master an opportunity to see wherein his report is subject to objection, and to apprise the opposite party of just what he has to meet. An exception which practically requires the court to hear the whole case upon all the facts is too vague, general, and insufficient under the rules

¹ *Sheffield, etc. Ry. Co. v. Gordon*,
151 U. S. 285, 14 Sup. Ct. R. 343.

² *Chapman v. Pittsburg, etc. R. Co.*,
18 W. Va. 184, 198.

³ *Jones v. Osgood*, 2 Seld. (N. Y.) 233.

of practice, and should be overruled.¹ Being in the nature of special demurrers, the exceptions must point out the precise error relied upon, and the exceptant must always remember that the part not excepted to is taken as admitted.² Where there is a general objection to the admission of evidence, a part of which is and a part of which is not admissible, but the inadmissible part is not pointed out, the report is not objectionable which shows that the whole was admitted.³ Exceptions to the report of a master must state, article by article, those parts of the report which are intended to be excepted to. Exceptions to reports of masters in chancery are in the nature of a special demurrer, and the party objecting must point out the error, otherwise the part not excepted to will be taken as admitted.⁴ General exceptions, which only transfer the examination of the papers from the auditor to the chancellor, cannot be considered.⁵ Precisely the same rule obtains here as in objections to the admissibility of evidence, and for the same reasons, — "The party objecting is required to put his finger on the precise spot."⁶ They are in the nature of special demurrers, and must specify with reasonable certainty, when they are necessary at all, the particular grounds of objection relied on; or, in other words, "the exceptor must so frame his objection" that the opposing party may clearly see what he has to meet, and the court the question it has to decide, otherwise surprise and injustice might, and probably in most cases would, result.⁷ When he does so, the parts not excepted to are admitted to be correct, not only as regards the principles, but as relates to the evidence on which they are founded.⁸ "The

¹ *Columbus, S. & H. R. Co. Appeals*, 109 Fed. 177, 219, where the exceptions complained of are set out in full. See also *Railway Co. v. Gordon*, 151 U. S. 285, 14 Sup. Ct. 343.

² *Simmons v. Simmons' Adm'r*, 33 Gratt. 451, 457; *Hodges v. Solomons*, 1 Cox, 249; *Pearson v. Knapp*, 1 M. & K. 812; *Franklin v. Keeler*, 4 Paige, 382; *Noble v. Wilson*, 1 Paige, 164; *Candler v. Pettit*, 1 Paige, 427; *O'Reilly v. Brady*, 28 Ala. 530; *Brantley v. Gunn*, 29 Ala. 387, 389; *Ashmead v. Colby*, 26 Conn. 287; *Foster v.*

Gressett, 29 Ala. 393; *Royall v. McKenzie*, 25 Ala. 368; 2 *Daniell*, Ch. Pr. 1315; 2 *Hoffman*, Ch. Pr. 654.

³ *Ashmead v. Colby*, 26 Conn. 287, 308, 309.

⁴ *Story v. Livingston*, 13 Pet. 359, L. Ed., Book 10, pp. 200, 204.

⁵ *Scrivener v. Scrivener*, 1 H. & J. 743, 747; *Miller*, Equity Proc., sec. 545.

⁶ See "The Evidence," *ante*, § 283.

⁷ *Robinson v. Allen*, 85 Va. 721, 728, 8 S. E. 835.

⁸ *Wilkes v. Rogers*, 6 Johns. 566, 591, L. Ed., Book 4, pp. 216, 224.

exception must be positive, explicit and certain, leaving nothing to supposition or inference."¹

§ 457. **Must be specific — Continued.**— The rule is strictly enforced in the federal courts. In a recent case it is there said that the exceptions to a report of a master should set out specifically the errors relied upon, not only that the opposite party may be apprised of what he has to meet, but that the master may know in what particular his report is objectionable and that he may have an opportunity to correct his errors and reconsider his opinion. The main object of a reference — to relieve the chancellor of manual and clerical labor, serve the convenience of parties and shorten and simplify litigation as much as possible — is lost sight of, unless the objector is required to put his finger upon the precise error relied upon. General or "broadside" exceptions will not be permitted or considered.² Exceptions must be precise and specific, raising well defined issues, the finding of the master being *prima facie* correct.³ The rule, therefore, is universal — exceptions must be specific or they will be overruled.⁴

¹ Rader v. Yeargin, 85 Tenn. 486, 488; Ridley v. Ridley, 1 Cold. 323, 332; Musgrove v. Lusk, 2 Tenn. Ch. 576; Green v. Lanier, 61 Tenn. 662, 670; Turley v. Turley, 85 Tenn. 251, 255, 256; Story v. Livingston, 13 Pet. 359, 366; O'Reilly v. Brady, 28 Ala. 530; Ridley v. Ridley, 1 Coldw. (Tenn.) 323; Stanton v. Alabama R. R. Co., 2 Woods (U. S.), 506, Fed. Cas. 13,296; Reeside v. Reeside, 6 Phila. 507, 510; Wilkes v. Rogers, 6 Johns. 566; Dexter v. Arnold, 2 Sumner, 108, Fed. Cas. 3,858; Newcomb v. White, 5 N. Mex. 435, 23 Pac. 671; Hayes v. Hammond, 162 Ill. 133, 135, 44 N. E. 422; Moffett v. Hanner, 154 Ill. 649, 39 N. E. 474; Richie v. Levy, 69 Tex. 138, 5 S. W. 685; Dwyer v. Kalteyer, 68 Tex. 554, 5 S. W. 75; Foster v. Gressett, 29 Ala. 393; Brantley v. Gunn, 29 Ala. 387; Booth v. Purser, 1 Irish Eq. 33, 34.

² Railroad Co. v. Gordon, 151 U. S. 285, 14 Sup. Ct. 343; Neal v. Briggs, 110 Fed. 477.

³ Cutting v. Florida Ry. & Nav. Co. (U. S. Cir. Ct. N. Dist. Fla.), 48 Fed. 508; Medsker v. Bonebrake, 108 U. S. 66, L. Ed., Book 27, p. 654, 2 Sup. Ct. 351; Dexter v. Arnold, 2 Sumner, 108, Fed. Cas. 3,858; Story v. Livingston, 13 Pet. 359, 366; Greene v. Bishop, 1 Cliff. 186, 191, Fed. Cas. 5,763; Stanton v. Alabama, etc. R. R., 2 Woods, 506, 518, Fed. Cas. 13,296; Sheffield, etc. Ry. Co. v. Gordon, 151 U. S. 285, 290, 291, 14 Sup. Ct. 343; Hamilton v. Southern Nev. Gold & Silver Mining Co., 33 Fed. 562; The Commander-in-Chief, 1 Wall. (U. S.) 43; Foster v. Goddard, 1 Black, 506; Boogher v. New York L. Ins. Co., 103 U. S. 90; The Cayuga, 59 Fed. 483.

⁴ Alabama: Alexander v. Alexander, 8 Ala. 796, 797; Royall's Adm'r v. McKenzie, 25 Ala. 363; O'Reilly v. Brady, 28 Ala. 530; Mahone v. Williams, 39 Ala. 202; Brantley v. Gunn, 29 Ala. 387; Foster v. Gressett, 29 Ala. 393.

§ 458. **Must be specific — Continued.**— The enforcement of this rule greatly facilitates the labor of the chancellor, while a failure to observe it defeats entirely the object of a reference. For example, an exception to an item allowed by a master in an accounting must be specifically to the item complained of. An exception to the aggregate amount of the items contained in certain exhibits, and "to any part thereof," is too general, as it would require the court to restate the account, the same as if no accounting had been had before the master.¹ Where exceptions fail to point out or designate any item or ruling of the master deemed to be erroneous, the effect is to bring the whole case before the court and compel a hearing as to each item of the account. By this practice the purpose and object of the reference to the master to state the account is defeated. The chancellor, under such exceptions, is required to examine into and restate the account, precisely as if no reference had

Arkansas: *Ferguson v. Collins*, 8 Ark. 241.

Georgia: *Roberts v. Summers*, 47 Ga. 434, 489; *White v. Reviere*, 57 Ga. 386; *Arthur v. Com'rs Gordon Co.*, 67 Ga. 220; *Mason v. Com'rs*, 104 Ga. 35, 42, 30 S. E. 513.

Illinois: *Huling v. Farwell*, 33 Ill. App. 238; *Portoues v. Holmes*, 33 Ill. App. 312; *Cook v. Meyers*, 54 Ill. App. 590. See *Hurd v. Goodrich*, 59 Ill. 450, 456; *Pennell v. Lamar Ins. Co.*, 78 Ill. 803; *Jewel v. Rock River Paper Co.*, 101 Ill. 57; *Singer v. Steele*, 125 Ill. 426, 17 N. E. 751.

Iowa: *White v. Hampton*, 10 Iowa, 238.

Maryland: *Scrivener v. Scrivener*, 1 Har. & J. 743; *Darby v. Rouse*, 75 Md. 26, 22 Atl. 1110.

Missouri: *Singer Mfg. Co. v. Givens*, 35 Mo. App. 602.

New Jersey: *Holcomb v. Holcomb*, 11 N. J. Eq. 281.

New York: *Wilkes v. Rogers*, 6 Johns. 566; *Lefler v. Field*, 50 Barb. 407; *Miller v. Altieri*, 13 Misc. Rep. 220; *Ward v. Craig*, 87 N. Y. 550; *Wilson v. Allen*, 3 How. Pr. 369; *Jones v. Osgood*, 2 Seld. (N. Y.) 233;

Newell v. Doty, 88 N. Y. 88, 98; *Caldwell v. Murphy*, 1 Kern. 416; *Dunckel v. Wiles*, 1 Kern. 420; *Lansing v. Wiswall*, 5 Denio, 213; *Graham v. Chrystal*, 1 Abb. N. S. 121.

North Carolina: *Battle v. Mayo*, 102 N. C. 413, 9 S. E. 384; *Falls of Neuse Mfg. Co. v. Brooks*, 106 N. C. 107, 11 S. E. 456.

Pennsylvania: *Burke's Estate*, 144 Pa. St. 190, 22 Atl. 752.

South Carolina: *Bivingsville Mfg. Co. v. Bivings*, 7 Rich. Eq. 455.

Tennessee: *Rader v. Yeargin*, 85 Tenn. 486; *Ridley v. Ridley*, 1 Coldw. (Tenn.) 323; *Goddard v. Cox*, 1 Lea (Tenn.), 112; *Loveman v. Taylor*, 85 Tenn. 1; *Green v. Lanier*, 61 Tenn. 662, 670.

Vermont: *Smalley v. Corliss*, 37 Vt. 486, 492.

Virginia: *Robinett v. Robinett*, 19 S. E. 845; *Nickels v. Kane*, 82 Va. 309.

Wisconsin: *Reed v. Jones*, 15 Wis. 40; *Carroll v. Little*, 73 Wis. 52, 40 N. W. 582.

¹ *Snell v. De Land*, 138 Ill. 55, 63, 27 N. E. 707.

ever been ordered. Where there is no exception to any item, or to any specific ruling of the master, objections thereto must be deemed to have been waived.¹

The supreme court of Illinois, in speaking of the issues formed by exceptions to the findings of the master, say: "When such statement" (statement of account) "is made concisely, exceptions thereto may bring to the trial court and to an appellate tribunal the issue between the parties, so that the same may be comprehended and determined. The exceptions are the pleadings to the items of account, and must be specific, and not general, as they then can be reviewed by the appellate court or supreme court."²

Under the loose practice the court is called upon to search through the entire mass of evidence, to see if something cannot be found which will sustain the exception. The court is under no obligation to do this. Such a course renders the report of the master of no assistance, and is one which it is under no obligation to tolerate.³ It is too much to ask the court to grope through a vast mass of testimony and documentary evidence, in search of an error which is alleged to exist somewhere, and, by connecting in this instance the accountant with the judge, to ascertain what the error is.⁴ A question properly presented leaves the court without embarrassment; the chancellor will not have to guess or conjecture what is meant; the point reserved will be so simplified as to leave it certain that it must be settled in one of two ways. It can be determined without an explanation or an argument. This is the precision that is required in stating the points reserved.⁵ In all pleadings issues should be specific—in exceptions to

¹ Snell v. De Land, 138 Ill. 55, 63, 27 N. E. 707.

² Moffett v. Hanner, 154 Ill. 649, 655, 39 N. E. 474.

³ Huling v. Farwell, 33 Ill. App. 236; Heffron v. Gore, 40 Ill. App. 257; Huling v. Farwell, 132 Ill. 112, 23 N. E. 438; Moffett v. Hanner, 154 Ill. 649-655, 39 N. E. 474; Brown v. McKay, 51 Ill. App. 295; Hodson v. Eugene Glass Co., 54 Ill. App. 248; 1 Daniell's Ch. Pr. 300, 315, 317; Springer v. Kroeschell, 59 Ill. App. 434; Mott

v. Harrington, 15 Vt. 185-197; Prince v. Cutler, 69 Ill. 267; Wolcott v. Lake View Bldg. & Loan Ass'n, 59 Ill. App. 415; Friedman et al. v. Schoengen et al., 59 Ill. App. 376; Minchrod v. Ullman, 60 Ill. App. 400, 402, 403, 163 Ill. 25, 44 N. E. 864; Thornton v. Commonwealth Loan Ass'n, 181 Ill. 456, 458, 54 N. E. 1037.

⁴ Alexander v. Alexander, 8 Ala. 796, 804; Powers v. Dickie, 49 Ala. 81, 82.

⁵ Powers v. Dickie, 49 Ala. 81, 83.

the report of a master especially so; otherwise the work of the accountant appointed by the court will be of no practical effect, but the case had as well be tried *de novo* by the jury.¹

In Michigan it is held that where a commissioner's finding is excepted to in a case of accounting, such exception must be definite and specific. In a recent case the supreme court of that state lay down the rule as follows: "The objection to each item of an accounting must hereafter specifically and definitely set forth the grounds of the objection, or the exception will not be considered." The court here refer to *Emerson v. Atwater*² and *Barnebee v. Beckley*³ as to the proper method of excepting to a referee's report upon an accounting, and then add: "We have been called upon to examine several hundred disputed items, and to search a record of eight hundred pages, to find the evidence bearing upon such items, and it has been a wearisome and unsatisfactory work."⁴ When exceptions are properly taken — are specific and to the point, — the court can easily determine whether the item of debit or credit thus assailed is a lawful or a legal credit, or whether the proof that sustains it is sufficient or insufficient, and if an exception is not sufficiently specific and definite the fault rests upon counsel alone, "for the court cannot turn aside to help a party make out his case; he must do this himself."⁵

§ 459. **Must be specific — Continued.**— It remains for us to see what the courts have held to be a compliance with the rule and what not; in other words, what exceptions are held to be sufficiently specific and what insufficient. All that is necessary is that the exception should distinctly point out the finding and conclusion of the master which it seeks to reverse. Having done so, it brings up for examination all questions of fact and law arising upon the report of the master relative to that subject.⁶ Exceptions to the findings of fact by a master are sufficient where they notify the master exactly in what particular each finding is objectionable, and give notice

¹ *Arthur v. Gordon County*, 67 Ga. 320, 223.

² 12 Mich. 814, 828.

³ 43 Mich. 618, 617.

⁴ *Crawford v. Osmun*, 90 Mich. 77, 80, 51 N. W. 358.

⁵ *Powers v. Dickie*, 49 Ala. 81, 88.

⁶ *Foster v. Goddard*, 1 Black (U. S.), 508.

to the other party of what he is required to meet.¹ They are sufficient where "they distinctly point out the findings and conclusions of the master which they wish to reverse."² Exceptions may not be artistically drawn and yet may be sufficiently specific to raise all questions contended for by counsel.³ All that is required in exceptions is that "the exception should distinctly point out the finding and the conclusion of the master which it seeks to reverse."⁴ It was therefore held that an exception to the report of an auditor charging a certain sum against the exceptant is sufficient to save the objection to the allowance of interest upon the principal of the item involved, although there was no exception specially objecting to the allowance of interest.⁵ In the cases cited in the foot-note the exceptions were held to be sufficiently specific.⁶

§ 460. **Must be specific — Continued.**— Having in the last section shown what exceptions are held to be sufficient, it remains for us to give examples of those held to be insufficient. All exceptions ought to tender some proposition on which the court may decide; therefore, upon the argument of exceptions to the master's report, one of which was that the master, in taking a certain account, had found a certain aggregate sum due, "whereas the master ought to have found a less sum due," the exception was held to be too general.⁷ In a case where similar objections were taken to a master's findings, the master of the rolls held the objections to be informal and irregular, remarking: "I am called on here to decide that the master

¹ *McMannomy v. Chicago, D. & V. R. Co.*, 167 Ill. 497, 47 N. E. 712, rev'g 63 Ill. App. 259.

² *Foster v. Goddard*, 1 Black, 506; *Fidelity Ins. & Safe-Deposit Co. v. Shenandoah Iron Co.* (U. S. Cir. Ct. W. Va.), 42 Fed. 872.

³ For a series of exceptions held to be "sufficient in form and substance to present for review the findings of fact and conclusions of law contained in the master's report," see *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 57 Fed. 441; *Foster v. Goddard*, 1 Black, 506; *Story v. Livingston*, 18 Pet. 359.

⁴ *Foster v. Goddard*, 1 Black, 506, 509; *Fidelity Ins. Co. v. Shenandoah Iron Co.*, 42 Fed. 872, 874; *Thornton v. Com'l Loan Ass'n*, 181 Ill. 456, 54 N. E. 1037; *Kinsella v. Cahn*, 185 Ill. 208, 56 N. E. 1119; *Bishopp v. Blair*, 90 Ill. App. 64, 81.

⁵ *Marmion v. McClellan*, 25 Wash. L. Rep. 70.

⁶ *Foster v. Goddard*, 1 Black, 506; *Fidelity Ins. etc. Co. v. Shenandoah Iron Co.*, 42 Fed. 872, 874; *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 57 Fed. 441, 444, 445.

⁷ *Stocken v. Dawson*, 2 Phil. 140.

should not have reported as he has done, without giving any opinion as to what his report should have been."¹

In a case decided by the circuit court of the southern district of Alabama, the ground upon which an exception to the master's report was based was "that extravagant salaries were allowed the auditor, the treasurer, general superintendent and other officers and agents employed by the receivers." Of this the court say:

"This branch of the exceptions is too vague and general, and requires of the court the performance of duties which properly belong to the master and counsel. Exceptions should be precise, and raise well defined issues. The exceptor in this instance should have stated what officers were referred to, and what salaries were allowed them. Instead of this, the exception is launched at the compensation generally of the auditor, treasurer, general superintendent and all other officers and agents of the receivers, without stating what salary or compensation was allowed to any one of them. It is impossible for the court to pass intelligently on such an exception, and no rule of equity practice requires the court to make the effort to do so."²

General exceptions to a master's report, for example, "such finding is not sustained by the evidence," or, "such finding is contrary to law," are insufficient and the court may refuse to consider the same.³ So, too, where the exception was that the auditor had stated against the evidence, the chancellor held it to be too general.⁴ An exception as follows: "The plaintiff excepts to each and every one of the decisions and rulings of the referee against the plaintiff on the trial of this action, severally, separately and distinctively," amounts to nothing and presents nothing to the court for review. So, too, the exception that "the plaintiff excepts to each and every one of the referee's findings of fact, severally, separately and distinctively, found and stated in his report, and alleges that his finding on each and every one of the questions of fact sub-

¹Cullen v. Dean and Chapter of Killaloe, 2 Ir. Ch. R. 138.

²Stanton et al. v. Alabama & C. R. Co. et al., 2 Woods, 506, Fed. Cas. No. 18,297.

³Springer v. Kroeschell, 59 Ill. J. 748.

App. 434, 437, 438; Hurd v. Goodrich, 59 Ill. 450; Story v. Livingstone, 18 Pet. 359; Smalley v. Corliss, 37 Vt. 486.

⁴Scrivener v. Scrivener, 1 Har. &

mitted by him is unsupported by and contrary to the evidence," points to no specific error, and such exception is entirely useless verbiage. If it calls upon the court to perform any duty at all, it is to try the case over again upon the facts. Such an exception, in the face of repeated adjudications upon the subject, "amounts to a reflection upon the qualification of counsel," who ask relief upon a case so unskillfully prepared and presented."¹ The following exception was held to be too general: "The above plaintiff excepts to the report of the referee in the above action, and to each and every part thereof, both as to his findings of fact and conclusions of law." Such an exception is too general to authorize the court to review any question arising upon the report.² An exception as follows: "The defendant herein hereby excepts to each and every of the findings of fact and conclusions of law contained in the referee's report in this action, except the sixth and seventh finding of fact," is a general objection to the findings and not specific enough.³

§ 461. **Must be specific—Continued.**—Additional examples of insufficient exceptions are given as follows: "For that the master has stated and certified in his report that there is due upon the said mortgage mentioned in plaintiff's bill, the sum of \$1,366.36, whereas he ought, as the plaintiffs are advised, to have reported that there is nothing due upon said mortgage." This exception was rightly held by Mr. Justice Story to be too loose and general in its terms, "and points to no particulars. It comes to nothing unless specific errors are shown in the report itself. At present it amounts only to a general assignment of errors, and the argument on this question has shown none."⁴ Where the exception ran as follows: "For that the auditor hath omitted to charge the defendant with sundry sums of money and with sundry articles properly chargeable in account," it was held that the exceptions were too "indefinite and uncertain."⁵ The following was held insuffi-

¹ *Newell v. Doty*, 33 N. Y. 83, 93, citing *Jones v. Osgood*, 2 Seld. 233;

Caldwell v. Murphy, 1 Kern. 416; *Dunckel v. Wiles*, 1 Kern. 420; *Lansing v. Wiswall*, 5 Denio, 213.

² *Wheeler v. Billings*, 38 N. Y. 263.

³ *Graham v. Chrystal*, 1 Abb. N. S. 121.

⁴ *Dexter v. Arnold*, 2 Sumn. 108, 117, 125, Fed. Cas. 3,858.

⁵ *Norwood v. Norwood*, 2 Bland, 471, 481; *Miller, Equity Procedure*, sec. 545, note.

cient: "The defendant hereby excepts to the findings of fact and to the conclusions of law of the referee herein."¹ An exception in these words: "And for other and various reasons apparent upon the face of said report," is vague, indefinite, general, and by it no particular item is pointed out.² So, too, the exception that the master allowed "other fees and percentages which were not chargeable against the complainants," is too general and indefinite to be considered;³ and under a general exception to a master's report to the allowance of interest, the exceptant is not entitled to object to the rate of interest allowed.⁴

In the case of *Duden v. Maloy*,⁵ the following exception was held to be insufficient according to the practice in that circuit and was so declared by the court: "For that the master has found contrary to the preliminary requisitions and objections of defendant to his proposed draft report and which requisitions and objections he here repeats and contends that fresh evidence should be taken thereon." An objection to an item in an account which simply alleges that it is too small is insufficient. The objection should define in what sum it is too small. This is necessary to enable the chancellor to correct it by making the proper addition.⁶ Where exceptions are insufficient it would seem to be the proper practice to raise the question at once without waiting till the hearing, though, if not sufficiently specific, they may be overruled upon that ground at the hearing. The sufficiency of an exception in this regard may be raised by demurrer, and, if the demurrer is sustained, such exception will be stricken,⁷ or by motion to strike same from the files.⁸ An exception must be specific, or under the Georgia practice it will be stricken by the court.⁹ If

¹ *Thompson v. Hazard*, 120 N. Y. 634.

² *Young v. Omohundro*, 69 Md. 424 16 Atl. 120.

³ *Barnes v. Taylor*, 80 N. J. Eq. 7.

⁴ *Baker v. Mayo*, 129 Mass. 517.

⁵ U. S. Cir. Ct., 2d Ct., 43 Fed. 407, 410.

⁶ *Powers v. Dickie*, 49 Ala. 81, 84. For an exception held to be insufficient, see *Greene v. Bishop*, 1 Cliff. 186, Fed. Cas. 1,228, 1,231; and for

another case, in which the court criticised the exceptions as too general, see *Williams v. Lindblom*, 163 Ill. 346, 45 N. E. 245.

⁷ *Bell v. Windsor*, 79 Ga. 193, 199, 4 S. E. 100.

⁸ *Pool v. Gramling*, 88 Ga. 653, 659, 16 S. E. 52; *Thomas v. Gaboury*, 80 Ga. 443, 448, 7 S. E. 690.

⁹ *Mason v. Commissioners*, 104 Ga. 35, 39, 42, 30 S. E. 513.

the exceptions are held to be insufficient, the exceptant may apply at once to the court for leave to amend.¹

§ 462. **Must not be too broad.**—Another error to be avoided by counsel is that of making objections and exceptions too broad, that is of making them cover too much. As stated in the last few sections, they must be specific, or, in other words, the several findings or items must be excepted to item by item, article by article. A party may take one general exception to a master's report so far as it is against him, but he does it at his peril if it is found that his exceptions cover too much.² An exception leveled at a number of distinct items, some of which are legal, must specifically point out the parts claimed to be illegal, and if it does not it will be overruled.³ The consequence of such a general exception is that if the master was right in any one particular the exception must be overruled.⁴ Where the exception is general, charging that the master erred in a number of particulars, then the court must overrule the exception if the master was right in any one of the particulars complained of;⁵ that is, if one general exception is taken to a report, including several distinct matters, and the report appears right in any one instance, the exception will be overruled.⁶ If a general exception be taken without specification, and the court finds the master right in any one independent particular, the exception must be overruled, just as at law a general demurrer to the whole declaration must be overruled if any substantial part of it is good.⁷ Where one exception includes several distinct items or matters, and does not point to any one of them in particular, but is leveled at all of them in a mass, it may be overruled, unless the report appears to be wrong as to every one of them.⁸ Such an exception attempts to throw upon

¹ See *post*, § 465.

² *Higbie v. Brown*, 1 Barb. Ch. 820; *Hodges v. Salomons*, 1 Cox, 249; *Ashmead v. Colby*, 26 Conn. 287; 2 *Daniell's Ch. Pr.* (5th ed.) 1315, n.

³ *Moore v. Langford*, 6 Sim. 323; *Pearson v. Knapp*, 1 Mylne & K. 312; *Brantley v. Gunn*, 29 Ala. 387; *O'Reilly v. Brady*, 28 Ala. 530; *Royall v. McKenzie*, 25 Ala. 363.

⁴ *Enright v. Fitch*, 70 Vt. 183, 193; *Green v. Weaver*, 1 Sim. 404; *Candler*

v. Pettit, 1 Paige, 427; *Franklin v. Keeler*, 4 Paige, 382.

⁵ *Gompertz v. Best*, 1 You. & Coll. 114.

⁶ *McMannomy v. Walker*, 63 Ill. App. 259; 1 Barb. Ch. Pr. 552.

⁷ 1 *Hoffman*, Ch. Pr. 250; 4 *Minor's Inst.*, Pt. 2, p. 1248.

⁸ *O'Reilly's Adm'r v. Brady*, 28 Ala. 530, 535; *Royall's Adm'r v. McKenzie*, 25 Ala. 363, 374.

the chancellor the duty which he rightly devolved upon the master. Such an exception should be overruled.¹ It is too much to ask the court to grope through a mass of testimony and documentary evidence in search of an error which is alleged to exist somewhere.²

A party cannot by a general exception to a master's report require the chancellor or court of review to go through an entire record and restate the account.³ The same rule obtains in exceptions to masters' reports as in the case of objections made to the admission of evidence.⁴ Take the following as an illustration of this rule: In an Alabama case a general exception was filed to a portion of a master's report which involved the examination of at least one hundred and sixty different and specific claims, and the examination of a voluminous mass of evidence. Instead of directing the exceptions to the items supposed to be incorrect, they were leveled at the whole mass,—“thus throwing upon the chancellor the entire duty which he rightly devolved upon the master.” The court held the action of the chancellor in overruling such a general exception to be right and proper, remarking: “It is the office of the exception, where the report embraces separate and distinct items or matters, to point out the particular one objected to; and, as this was not done, the action of the chancellor in overruling it was free from error.”⁵

To this general and salutary rule there is a well recognized exception, viz.: If an exception to a master's report relates to an aggregate credit, a part of which is legal and a part illegal, it is good, although it does not point to the portion claimed to be illegal, if the party excepting has no means of discriminating the one from the other. The burden is on the party claiming the credit to point out the legal portion. “The authorities which require the pointing out of the illegal part of an aggregate which is in part legal do not apply to cases where a party

¹Id.

²Alexander v. Alexander, 8 Ala. 796, 804; Hodges v. Salomons, 1 Cox Cas. 249.

³Farwell v. Huling, 132 Ill. 112, 115, 23 N. E. 438; Murrah v. Branch Bank, 20 Ala. 392; Melton v. Troutman, 15 Ala. 535; Smith v. Zaner, 4

Ala. 99, 105; Gibson v. Hatchett, 24 Ala. 201.

⁴See Brantley v. Gunn, 29 Ala. 387, 392. See also “The Evidence,” *ante*, §§ 283, 284 *et seq.*

⁵Royal v. McKenzie, 25 Ala. 368, 374, 375.

brings forward a credit and asks its allowance, when there is commingled with it an undistinguishable proportion of illegality.”¹ If a master allows all the objections taken before him, and the party excepts before the chancellor on the ground that he ought not to have allowed all of them, the party excepting will succeed, if he shows that the master was wrong in allowing one; but, if the exception is because the master ought not to have allowed any of them, then, if one was proper to be allowed, the general exception fails as to all.²

§ 463. **Must not attack order.**—A party cannot attack the order of reference by exceptions to the master’s report, but only by a direct motion for that purpose.³ The master, in his ministerial character, is bound strictly to follow, obey and carry into effect all orders and instructions of the court;⁴ that is, in his action he is bound to conform to the decree. His duties consist in carrying its directions into effect. If he departs from the terms of the order of reference, and though its provisions be erroneous and the action of the master correct, that is, if he does not do what the court directs him to do, but what the court should have ordered him to do, nevertheless his act is erroneous and subject to exceptions, whereas, if he follows the decree, however erroneous it may be, an exception taken must be overruled.⁵ On the contrary, as long as his action conforms to the provisions of the order of the court exceptions will not lie. A party is not permitted by exceptions to a master’s report to call in question the propriety or validity of any previous orders of the court. He cannot have the benefit of a rehearing, or a bill of review, or an appeal, or writ of error, or an original bill, by simply filing exceptions to a master’s report. On the hearing of such exceptions all former proceedings must be considered as conclusive. Exceptions must be confined to the report itself, that is to some act or acts of, or of some omission, on the part of the master as shown on the face of the report. If the master has obeyed

¹ Pearson v. Darrington, 32 Ala. 227, 241.

² Moore v. Langford, 6 Sim. 325, 327.

³ New Orleans v. Gaines, 15 Wall, 624. See Felch v. Hooper, 4 Cliff. 489, Fed. Cas. 4,718.

⁴ Fenwicke v. Gibbs, 2 Dessaus.

629; Felch v. Hooper, 4 Cliff. C. Ct. 489, 494, Fed. Cas. 4,718; Simmons v. Jacobs, 52 Me. 147, 153. See “Order of Reference.” *ante*. § 150 *et seq*.

⁵ Maury v. Lewis, 10 Yerg. (Tenn.) 115, 119.

the decree, and his report is sustained by the facts, exceptions are of no avail.¹ An exception can only be taken to something appearing on the face of the report, or to the findings upon which the report is based. An exception which undertakes to point out errors, not in the master's report, but in the previous proceedings, is bad. A party will not be permitted to question the propriety of orders preceding a reference in this summary way.² Exceptions to a master's report, which, if sustained, would require the master to perform an act not authorized by the order of reference under which he is acting, are bad;³ in other words, a party will not be heard to complain that the master failed to do something which he had no power to do. For this reason a defendant who has permitted a bill for an accounting to be taken as confessed against him cannot, by exceptions to the master's report, question his liability to account, that matter being settled by the interlocutory decree.⁴

§ 464. Second report—Objections and exceptions to.— Sometimes a question arises as to the necessity of repeating exceptions to a master's second report, where the first report is referred back to the master for revision and the master's findings are still unsatisfactory to the complaining party. There are three classes of cases where this is liable to come up:

First. Where a matter is referred back to a master generally, that is, without any limitation upon his authority, but leaving the matter open for the exercise of his discretion.

Second. Where a matter is referred back to the master, with specific directions to do a specific thing, or to return a particular finding, leaving no discretion in the master.

Third. Whether a party can except to a finding in a second report where he failed to except to the same finding in the first report.

In the first case named the party desiring to further contest the master's findings must pursue the precise course necessary

¹ Musgrove v. Lusk, 2 Tenn. Ch. 576, 579; Felch v. Hooper, 4 Cliff. C. Ct. 489, 494, Fed. Cas. 4,718; Maury v. Lewis, 10 Yerg. (Tenn.) 115, 119.

² Musgrove v. Lusk, 2 Tenn. Ch. 576, 579; Felch v. Hooper, 4 Cliff. C. Ct. 489, 494, Fed. Cas. 4,718; Maury v. Lewis, 10 Yerg. (Tenn.) 115, 119.

³ Woodfin v. Anderson, 2 Tenn. Ch. 831, 837; Chaffin v. Chaffin, 2 Dev. & B. Eq. 255, 267; Gordon v. Lewis, 2 Sumn. 143, 146, Fed. Cas. 5,613; Maury v. Lewis, 10 Yerg. (Tenn.) 115, 119.

⁴ Miller v. Howard, 26 N. J. Eq. 166.

in a case of a first report; that is, he must, in jurisdictions where it is necessary to file objections to the draft report, file such objections with the master, and renew them in the form of exceptions upon the coming in of the second report; that is, where a matter is recommitted to a master, his second report, as to all matters which must be raised by exception, is final unless exceptions are also filed to his second report. Exceptions filed to the first report are not sufficient.¹ Where a party excepts to a part of the master's findings and, upon the hearing, some are allowed, and the cause again referred, and the master again reports, no exceptions will lie to matters not objected to in the first report. Failing to except to such items in the first report will be held to be an admission of their correctness. That is to say, on review of a master's report by the chancellor, no objections can be raised on appeal from a second report, made in pursuance of an order to review his report, which might have been taken, but were not, to the original report. All objections not taken to the original report are considered as waived.² But in the second case, that is where the report is recommitted to the master with instructions to do a particular thing, and the master obeys the order of the court, it would be improper to except to the report on the ground that the master did not act directly in the face of the decretal order. A party cannot, by excepting to a report which is made in conformity with the directions of the court, as contained in the order of reference, indirectly attack the order. If dissatisfied with the order of reference, he should move the court to set it aside or pray an appeal.³ For the same reason it is improper upon an amended report to raise the same questions which have been considered and decided by the court on the exceptions to the original report.⁴ In the third case above mentioned the party is not permitted to file exceptions upon

¹ King v. Burdett, 44 W. Va. 561, 563, 29 S. E. 1010; Findley v. Findley, 42 W. Va. 872, 884, 26 S. E. 433; Carskadon v. Minke, 26 W. Va. 729, 738; Hooper v. Hooper, 29 W. Va. 276, 283, 1 S. E. 280; Kee v. Kee, 2 Grat. (Va.) 117.

² Ross v. Perrault, 18 Gr. Ch. 206.

³ Clark v. Willoughby, 1 Barb. Ch.

(N. Y.) 68, 71. For a full discussion of this subject, see *ante*, § 442, where it is fully shown that exceptions are never permitted in a case where the master has simply complied with the directions of the court.

⁴ Clark v. Willoughby, 1 Barb. Ch.

the coming in of the second report, his failure to do so in the first instance being an admission that the findings were correct.

§ 465. **Amendment of exceptions.** To prevent a failure of justice it is sometimes necessary for the court to grant leave to a party to amend his exceptions. It has already been shown that where by accident, surprise, or mistake, a party has failed to file objections with the master to his draft report, the court will re-refer the cause to the master with leave to file objections, or may, in rare cases, permit him to file exceptions as if he had filed such objections.¹ This is done to prevent a failure of justice, and it follows, therefore, for the same reason, that, where a party has attempted to comply with the rule, but by accident or mistake has his objections in such shape that the court cannot fairly pass upon the merits, the court not only may but should grant leave to amend. Therefore it has been held that it is within the discretion of the court to permit amended exceptions to be filed, but exceptions are not pleadings in the sense that they can be amended or added to as a matter of right at any stage of the case.² The court will be more liberal in allowing amendments to exceptions that were filed in time than in allowing a party to file new exceptions after the time has expired.³ Of course, in jurisdictions where the English rule is enforced requiring a party to file objections with the master, exceptions before the chancellor cannot, by amendment or otherwise, be made other or different than such objections. In a federal case it was held that, where exceptions are found to be insufficient, it is in the discretion of the court to refer the case back again to the master, or grant leave to amend such exceptions upon the hearing. In the case referred to, where the exceptions, forty-seven in number, were wholly insufficient, the court said: "It appearing, however, that the cause can be re-assigned for hearing without prejudice to the parties, or the pending business, the court will grant time and leave to amend the exceptions."⁴

¹ *Ante*, "The Draft Report and Objections Thereto," § 362 *et seq.* See also *ante*, §§ 444, 445. Ga. 630, 644, 24 S. E. 157; *Suttles v. Smith*, 75 Ga. 830.

² *Lane v. Macon & Atl. Ry. Co.*, 96

³ *Lane v. Macon & Atl. Ry. Co.*, 96 Ga. 630, 644, 24 S. E. 157.

⁴ *Jones v. Lamar*, 39 Fed. 585, 587.

§ 466. **Pointing out the evidence.**—In some jurisdictions, notably in Alabama, Tennessee and in some of the federal circuits, the courts insist upon the exceptant pointing out in the exception itself the evidence relied upon in its support. In Alabama it is provided by Chancery Rule No. 94, that: “In filing exceptions to the report of the register, or any part thereof, it shall be the duty of the solicitor filing the same to note at the foot of each exception to conclusions of facts, drawn by the register, the evidence or parts of evidence he relies on in support of the exceptions, with such designation and marks of reference as to direct the attention of the court to the same; and if the opposing solicitor desires to do so, he can note in writing such other parts of the evidence as he may deem material to the inquiry. In considering such exceptions, the chancellor need not examine testimony not thus noted.” Under this rule exceptions taken to the findings of a master dependent upon testimony before him are properly overruled, unless taken and reserved as required by the rules of practice.¹ That is, the exception is to be overruled, unless it refers to the evidence, or parts of evidence relied upon in support of same, with “such designation, and marks of reference, as to attract the attention of the court to the same.”² Exceptions to the report of a register, which refer the court to the entire testimony of witnesses and the ledger accounts they produced, do not comply with the rule requiring the evidence or parts of evidence relied upon to sustain an exception to be noted at its foot, and will not be considered.³

In a leading case on the subject the supreme court of Tennessee lay down the rule as follows: “Exceptions to a report should be numbered; refer to the pages and particular items in the report excepted to; state briefly the grounds of exception, and refer to the particular pages of the depositions or documentary evidence relied upon, and not generally to a deposition, which is often of great length, and relates to different subjects, and does not, perhaps, contain more than a single

¹ Kilpatrick v. Henson, 81 Ala. 464, 470, 1 So. 187. Crump v. Crump, 69 Ala. 156; Vaughan v. Smith, 69 Ala. 92, 94; Pruitt

² State v. McBride, 76 Ala. 51, 60; v. McWhorter, 74 Ala. 315. Mooney v. Walter, 69 Ala. 75; Mahone v. Williams, 89 Ala. 202, 224, 225; ³ Warren v. Lawson, 117 Ala. 389, 23 So. 65.

sentence pertinent to the matter excepted to. This can readily be done with little trouble or inconvenience to the person who prepares the exceptions, and will save the court the intolerable labor of searching, as it is often otherwise required to do, through a large record, to ascertain the meaning of exceptions which should explain themselves. Each exception is in the nature of a separate suit, and should state the cause for which it is taken.”¹

In a case reported in Tennessee there were one hundred and thirty-five exceptions in all. From this number the court selected the following six as samples:

“To item 1, to cash of M. E. Cochran & Co., \$442.27, because the proof shows that he received \$449.53½.” “To item 2, cash of M. E. C. & Bro., \$101.43, because it should be \$144.90.” “To item 7, cash of M. H. & Co., \$401.47, because it should be \$800.00.” “To item 10, cash of M. H. & Co., \$50.00, because not sustained by proof.” “Item 11, cash of same, \$401.46, for want of proof.” “No. 12, cash of same, \$100, because proof shows only \$50.00.”

Upon these exceptions, and similar ones, in the same case, the court say:

“Most of the exceptions are of the same character as these, without any intelligible statement of the ground of exception, the nature of the charges excepted to, or the character of the evidence by which the exceptions are sustained; and, in many particulars, the court might as well be referred to a table of logarithms, as to the matters contained in the master's report, or the exceptions thereto, and could as readily determine the case by such a reference as by those that are given.”

§ 467. Pointing out the evidence — Continued.—In the federal courts there are many cases which hold that exceptions should set out or refer to that portion of the testimony upon which the exceptor relies. The following are given as samples of such rulings: “Exceptions to the master's report are regarded so far only as they are supported by the statement of the master, or by evidence to which the attention of the court is called by reference to the particular testimony. *Jefrey v. Brown*, 29 Fed. R. 476, and cases there cited; *Taylor*

¹*Green v. Lanier*, 61 Tenn. 662, 670, 671.

Mfg. Co. v. Hatcher Mfg. Co., 39 Fed. R. 440. The exceptions make no allusion to the evidence, whereas they should have set out that portion of the evidence upon which the exceptor relied.”¹

In a case in the circuit court for the southern district of Georgia, a case involving something over \$150,000, with a voluminous record and a lengthy master's report, to which there were forty-seven exceptions filed, the court say:

“Upon inspection of the record the court is at the very threshold of the hearing confronted with the fact that the solicitors for complainant have entirely failed to identify, specify or refer to the particular portions of the evidence relied upon to support the exceptions. The consideration of a few of the exceptions will illustrate the unnecessary labor it is now proposed to inflict upon the court by this imperfect method of procedure. For instance, exception 8: ‘That the master erred in finding that there was no evidence before him that G. B. Lamar usually kept correct books of account.’ Again, exception 20: ‘That the master erred in finding that the expenses incurred by G. B. Lamar in collecting said cotton amounted to no more than \$85,506.60.’ Again, exception 21: ‘That the master erred in finding that the preparation of the expense for the collection of said cotton due by the estate of C. A. L. Lamar did not exceed \$25,644.48.’ In this manner, and wholly without reference to the testimony, complainant's forty-seven specifications of error are made. Now, it is evident that in the discussion of all issues of fact, raised by either exception, the comments of the solicitors might take as wide a range as the entire record does, and the labor of considering the entire mass of testimony, relevant and irrelevant, in order to sift out that which is pertinent to the issue raised, would be imposed on the court. The labor of the court would therefore not be abridged by the reference, and the proceedings had before the master would be fruitless. The language of Mr. Justice Swayne, in *Foster v. Goddard*, 1 Black, 501, 506, referred to in the argument, that ‘all that is necessary is that the exception should distinctly point out the findings and conclusion of the master which it seeks to reverse,’ was directed only to the

¹ *Cutting v. Florida Ry. & Nav. Co.*, 43 Fed. 743, 747.

question raised by the objection of the counsel in that case, viz.: that 'such an exception is in the nature of a special demurrer, and that these are not so full and specific that the court can consider them.' To be sufficiently explicit to raise any issue of law is one thing; to point out the evidence relied upon to sustain an exception to a finding upon the facts is quite a different thing. . . . The rule is one of practical utility, and is intended to narrow the range of investigation and consideration by the court to the evidence controlling the questions at issue, and if the solicitors will bear this purpose of the rule in mind, there will be little difficulty in preparing exceptions in accordance therewith. . . . It is not necessary, in the spirit of this rule, to set out *in extenso* in the exception the evidence relied upon to sustain it, but the evidence must be so specified and referred to as to enable the court to understand its substance, and, if it is thought proper, to turn to it and ascertain its full import and effect without unnecessary labor and waste of time."¹

§ 468. Pointing out the evidence — Continued.— The master is supposed to refer to the evidence contained in the record as the basis of his findings, and if counsel, who are dissatisfied with such findings, desire the court to examine evidence which, in their judgment, is sufficient to warrant the court in arriving at a different conclusion from that of the master, it is the business of the attorney to point out such evidence, to locate it in the record so that the court can easily turn to it, and see whether the contention of counsel is supported; but if the court is expected to begin at page one, and examine perhaps five hundred pages of testimony, in other words, to hunt through the record from end to end to find some evidence to justify the objection made by counsel, it is not surprising that the court should fall back upon the rule announced, or, to use as an illustration, the language of the court in the case of *Jones v. Lamar*, 39 Fed. 585, 587: "Solicitors for complainant say that they are unwilling to rely solely upon the evidence referred to by the master as the basis of his findings, and since they have specified nothing else, and since the court, under the rule in *Harding v. Handy* (11 Wheat. 103 and 126), will not consider

¹ *Jones v. Lamar*, 39 Fed. 585.

testimony in support of the exceptions not referred to in the report of the master, or brought to its attention by proper reference in the exceptions, exceptors are unable to proceed.”¹

In another case it is said that exceptions are to be regarded only so far as they are supported by the special statements of the master, or by evidence which must be brought to the attention of the court by reference in the exceptions to the particular testimony relied upon to set the report aside. Where the report of the master makes no special statement of the evidence, and the exceptions offered are assignments of alleged error, unsupported by reference to the evidence as the rule requires, the findings and decree of the lower court will be affirmed.² In the case of *Harding v. Handy*, it seems that all the court means by “pointing out” is, that the party excepting shall cause the master to report to the court that portion of the testimony bearing on the issue raised, instead of reporting the whole and allowing the court to grope for it.³

The practical utility of the rule commented upon in *Jones v. Lamar*⁴ rests upon three grounds:

First. The exception should point out specifically the errors upon which a party relies, that the opposite party may be apprised of what he has to meet.

Second. That the master may know in what particular his report is objectionable, and may have an opportunity of correcting the same.

Third. To save the court from the necessity of being obliged to rehear the whole case upon the evidence, as the main object of a reference to a master is to lighten its labors in this particular.⁵

The last reason assigned is the most important because, as said in the same case: “Cases are referred to the master, not on account of his superior wisdom, but to economize the time

¹ *Jones v. Lamar*, 89 Fed. 585, 587.

² *Farrar v. Bernheim*, 20 C. C. A. 496, 74 Fed. 435, 21 C. C. A. 264, 75 Fed. 186, 139, citing *Harding v. Handy*, 11 Wheat. 103, 126; *Jaffrey v. Brown*, 29 Fed. 476, 479.

³ See further on this subject, *Greene v. Bishop*, 1 Cliff. 186, Fed. Cas. 5,763; *Stanton v. Alabama &*

C. R. R. Co., 2 Woods, 506, Fed. Cas. 13,296; *Jones v. Keen*, 115 Mass. 170; *Miller v. Whittier*, 36 Me. 577; *Dunnell v. Henderson*, 28 N. J. Eq. 174.
⁴ 89 Fed. 587.

⁵ *Sheffield & Birmingham Coal, Iron & R. Co. v. Gordon*, 151 U. S. 285, 290, L. Ed., Book, 38, p. 163, 14 Sup. Ct. 343.

and labor of the court, as exceptions are usually filed to his report; if they are so general as to require rehearing of the entire case, there is really nothing saved by a reference."

§ 469. **Pointing out the evidence — Continued.**— Recently the appellate court of Illinois, first district, in a series of cases attempted to enforce the practice of requiring the exceptant to point out in his exception the evidence relied upon to support it. The rule sought to be enforced, as stated by the court, is as follows: Exceptions should point out the evidence on which the exceptant relies to sustain the exception. Any other course calls upon the court to search through the entire mass of evidence to see if something can be found which will sustain the exception. The court is under no obligation to do this. Such a course renders the report of the master of no assistance, and is one which it is under no obligation to tolerate.¹ This was an innovation in practice in that state, and for a time attorneys were all at sea in framing exceptions to masters' reports, until the supreme court, in two or three well considered cases, reversed the action of the lower court in this regard. In one of these cases the court held that where the evidence is all returned into court, as required by statute in Illinois, it is not necessary that the dissatisfied party should plead the evidence in his objections, nor that the master should state, in overruling an objection, what particular evidence he regards as relevant to his conclusion. "Like the chancellor, he is presumed to have considered all the competent evidence tending to prove or disprove the fact in question, and if he should state that he based his finding upon some particular item of evidence parties would not be bound by it. Neither the chancellor nor a court of review is expected, in any case, to perform the duties of counsel, and grope or search through a record for evidence to support the claims of either party. This is the function of counsel representing the parties, who are expected to present to the court such evidence as tends, on the one hand, to sustain the report of the master, and on the other hand to show its incorrectness. If an exception is specific

¹ *Wolcott v. Lake View Building & Loan Ass'n*, 59 Ill. App. 415, 419; *Huling v. Farwell*, 33 Ill. App. 238; *Hefron v. Gore*, 40 Ill. App. 257; *Brown v. McKay*, 51 Ill. App. 295; *Hodson v. Eugene Glass Co.*, 54 Ill. App. 248; *Springer v. Kroeschell*, 59 Ill. App. 434; *Rimmer v. O'Brien-Green Co.*, 64 Ill. App. 104, 107; *Friedman v. Schoengen*, 59 Ill. App. 876.

and relates to a matter of fact it will be sufficient, and upon the hearing the counsel for the respective parties will have the right to present to the court, from the record, such evidence as tends to establish or disprove the fact.”¹ This is done by selecting such evidence from the record as counsel deem material to the issue, and presenting the same to the court in the form of a brief or abstract.

In the federal courts, where the master only certifies to the court such portions of the evidence as requested by counsel, the chancellor ought to have no difficulty in finding the evidence bearing on the issues raised, for it is only this that is certified to the court; but in Illinois, and in other jurisdictions, where by statute all the evidence taken must be returned to the court, as well as in all cases where by rule of court or by the order of reference this is required, somebody must be charged with the duty of selecting and bringing together from the mass of evidence returned, portions bearing upon the questions raised by the objections. This duty devolves upon counsel. Mr. Justice Cartwright, speaking for the court in a recent Illinois case, says: “It seems to be supposed that the chancellor is required to do this work, and will be compelled to search through the evidence to find testimony which will sustain the exceptions, unless it is pointed out in the exceptions themselves. But this is not the duty of the chancellor nor is it the practice. As the hearing is only on exceptions, the chancellor is not required to hear any evidence except such as relates to the matters excepted to, and may, by any proper rule, effect that object, such as by requiring the evidence relating to such matters to be abstracted or otherwise presented in convenient and proper form.”² In a recent case the appellate court of that state reversed its previous holdings in this regard and rendered a decision in line with the supreme court cases above cited.³

VII. HEARING ON EXCEPTIONS.

§ 470. Hearing on exceptions — General principles.— It is said in some cases, in effect, that upon filing exceptions to a master’s report the whole case is opened up for rehearing,

¹ Minchrod v. Ullmann, 163 Ill. 25, 28-29, 44 N. E. 864.

² Interstate Bldg. & L. Ass’n v. Ayers, 71 Ill. App. 529.

³ Hayes v. Hammond, 162 Ill. 133, 135, 44 N. E. 422.

or, in other words, that where the "objections" are properly filed with the master, followed by "corresponding exceptions" in court, upon the hearing the "whole evidence is brought forward, and passes in review before the court;"¹ and again, that upon the coming in of the master's report the whole case is open to revision and the court may modify or set aside the order of reference and proceedings under it.² But these statements need qualification, as they are far too broad. In the first place the matters opened up are limited absolutely to the questions raised by the exceptions. In the case of *McClay v. Norris*,³ it is squarely stated that, upon the hearing of the exceptions, "the whole evidence is brought forward and passes in review before the court," but this is inaccurate, and needs the insertion after the word "evidence," some words equivalent to "upon which the master found the conclusion excepted to."⁴

The hearing before the chancellor is not a new trial upon all the questions involved, but only a hearing upon the contested points as narrowed down by appropriate, specific objections and exceptions. To hold otherwise would require the reading of the depositions at length, and the taking up and examination, one by one, of a vast number of separate items, requiring a length of time which the court, having any regard for its other duties, could not give to them. The object of a reference to a master is to enable him to bestow upon such matters all the time they require, and thus aid the court in the dispatch of business and the administration of justice, but, if the chancellor must retry the whole case on exceptions, then "it would have been obviously better for him to have had no reference, and to have required the parties to come before him and produce the testimony upon the different items."⁵ The hearing before the chancellor upon the return of the master's report must be had strictly upon exceptions to the findings. It is a mistake too commonly made by counsel to ask and expect the chancellor to retry the whole case, that is, to determine the

¹ *McClay, Adm'r. v. Norris*, 4 Gilm. 870; *Prince v. Cutler*, 69 Ill. 271; *Wolfe v. Bradberry*, 140 Ill. 578, 582, 80 N. E. 665.

² *Fourniquet v. Perkins*, 16 How. (U. S.) 82; *Pulliam v. Pulliam*, 10 Fed. 58.

³ 4 Gilm. 870.

⁴ *McMannomy v. Walker*, 63 Ill. App. 259, 278.

⁵ *Mahone v. Williams*, 39 Ala. 202,

matters in controversy by a review of the whole testimony, just as if no order of reference had passed or report been made, precisely as in case of a final hearing upon pleadings and proof without a reference.¹ Such a practice, if tolerated, would render the office of master a hindrance to the court instead of an aid, the result being to absolutely destroy the value of the master's work by giving to the defeated party two trials instead of one — one hearing before the master and a rehearing before the chancellor. The correct practice avoids this by giving to the master's report its due weight, presuming that his conclusions of both fact and law are correct until the contrary is shown, putting the burden of pointing out the error, if any, upon the objecting party, and permitting the chancellor simply to revise or review the master's work only so far as the dissatisfied party puts such alleged error in issue. A reference to a master would be worse than useless, if the whole investigation of the account, the facts in controversy, and the evidence in support of, and in opposition to, the same, were to be re-examined before the chancellor.²

The object of a reference to a master is not to give a party two trials instead of one. If such were the case, instead of "economizing the time and labor of the court"—the real intent and object of a reference,—it would in fact double the work to be performed. It was never intended that the court should rehear the case upon exceptions to the report, but rather that the court shall simply look into such allegations of error, in the master's work, as are specifically and definitely pointed out, and, if the court is clearly satisfied that error has intervened, correct the same. The power of the court in this regard is undeniable, but it is not to be exercised except for good cause; and mere differences of opinion as to the weight of evidence, where there is a substantial conflict, is not such good cause.³

In a federal case it is said that "there is no doubt about the power of a court of equity to revise the report of a master by supplying facts material which are shown by the evidence,

¹ *Greene v. Bishop*, 1 Cliff. 186, 190, Fed. Cas. No. 5,763.

² *Bridges v. Sheldon*, 18 Blatch. 295, 7 Fed. 17; *Jaffrey v. Brown*, 29 Fed.

³ *Mott v. Harrington*, 15 Vt. 185, 476, 481, 197.

but not stated in the report, by setting aside the findings of facts not shown by any evidence, or which are contrary to the evidence, and when errors in law have controlled or influenced the finding of material facts; but this revisory power of the court has never been considered as conferring a right upon a party to appeal from the master to the court upon disputed questions of fact, determined by the master as matters of fact upon conflicting testimony. The question here is purely one of fact; it arose upon the pleadings, and either party might have had it tried and determined upon evidence taken, according to the usual course, before the cause went to the master. The cause went to the master by consent, without this issue being tried; it has now been tried and determined as a question of fact, arising upon conflicting testimony, by him. To review his decision upon it now would be a rehearing of it upon, in effect, an appeal; and more, it would be allowing the party to come back to the court for the trial of a question voluntarily taken from the court to the master. Such a course is not according to the well-settled practice in such cases. "The parties have had a full trial and decision of the question by the master after his attention had been directly called to its controlling importance in the views of the court. To disturb his conclusion would be a departure from the usual course, which the court would not be warranted in taking, and to which neither party would be entitled."¹ Again it is said that the court will not occupy its time in verifying every minor detail passed upon by the master. Hence it is said: "It can hardly be expected that the court should, on exceptions to a master's report, verify each and every interest calculation. Should it be necessary to refer back the report to the master for any purpose, his attention may be called to the calculations of interest alleged to be erroneous, and he be directed to rectify any mistakes."² The court does not investigate the items of an account, nor review the whole mass of testimony taken,³ but, on the contrary, must confine itself strictly and solely to the issues raised by the objections and exceptions.

¹ *Bridges v. Sheldon*, 18 Blatchf. 295, 7 Fed. 34, 85; *Jaffrey v. Brown*, 20 id. 474, 479; *Greene v. Bishop*, 1 Cliff. 186, Fed. Cas. 5,763.

² *Chandler v. Pomeroy*, 87 Fed. 262, 267.

³ *Harding v. Handy*, 11 Wheat. 103, 104; *Snell v. De Land*, 136 Ill. 583, 27 N. E. 707.

§ 471. Evidence must be returned. — A review of a question of fact found by the master, depending upon evidence heard by him, necessitates the presentation of the same evidence to the reviewing tribunal. Hence where an exception to a master's finding is based on the ground that it is unsupported by the evidence, both the chancellor and upper court are powerless to pass upon the objection unless the evidence bearing upon it is returned by the master with his report.¹ So, too, where the master is not required to report the whole evidence by statute, the order of reference or a rule of court, he must return such portions as in the judgment of the parties is necessary to enable the court to pass on exceptions, and unless this is done the court is powerless to pass on exceptions to the master's findings of fact.² In case the evidence is not returned with the master's report, neither the chancellor nor the upper court can pass upon any question of fact raised by exceptions.³ Where the master fails to return the evidence with his report and no motion is made requiring him to do so, exceptions to findings of fact made by such master will necessarily be overruled. Such a course constitutes a waiver of the error on the part of the excepting party.⁴ Therefore it is the duty of a party, who having filed objections to a master's report, unless a statute, rule of court, or the order of reference requires the return of the whole evidence, to obtain certified copies of the depositions and other evidence before the master, on which the decision of the master was founded, to be used on the argument of the exceptions.⁵ Under the statute of Illinois the master is required to return all the evidence taken to the court, and if he fails so to do it is said the proper course is to except to the report on that ground.⁶ Especially is it true that the court will not consider any question depending on the evidence if it affirmatively appears that all the evidence admitted on the subject is

¹ *Silva v. Turner*, 166 Mass. 407, 44 N. E. 532. See *ante*, § 418.

² *Jones v. Keen*, 115 Mass. 170, 181; *Harding v. Handy*, 11 Wheat. 103, 126; *Adams v. Brown*, 7 Cush. 220, 222; *Greene v. Bishop*, 1 Cliff. 186, Fed. Cas. 5,768.

³ *Mackenzie v. Flannery*, 90 Ga. 590, 598, 16 S. E. 710.

⁴ *Gleason & Bailey Mfg. Co. v. Hoffman*, 168 Ill. 25, 30, 43 N. E. 143.

⁵ *Brockman v. Aulger*, 12 Ill. 277; *Prince v. Cutler*, 69 Ill. 267, and cases cited; *Pennell v. Lamar Ins. Co.*, 73 Ill. 303, 307; *Brown v. McKay*, 51 Ill. App. 295, and cases cited.

⁶ *Ronan v. Bluhm*, 173 Ill. 277, 50 N. E. 694; *Schnadt v. Davis*, 185 Ill. 476, 57 N. E. 652.

not before the court.¹ Upon an exception to the master's finding of fact, in the absence of a certificate from him that he has sent up all the evidence with his report, it is impossible for the court to impeach his conclusion, and, in the absence of such certificate, there is no presumption that he has sent all the evidence.²

The same rule, doubtless, applies here as in a chancellor's certificate of evidence or in a bill of exceptions. The presumption is that the court had sufficient evidence before it to justify the finding, in other words, the presumption is that the finding is right until the contrary is shown by a statement that the evidence embodied in the certificate or bill of exceptions is all that was *admitted* and an inspection of this evidence shows that such evidence so admitted does not warrant the finding.

The certificate must expressly state that all the evidence taken is returned;³ that "this was all the *testimony* given in the cause" is not equivalent to certifying that that "was all the evidence," since the word "testimony" does not include documentary evidence.⁴ It is probable that a less degree of certainty would be required in a master's certificate where the statute requires him to return all the evidence with his report, as in Illinois, than is required where no such statute exists. Stating that "the following is all the evidence offered" does

¹ Fellenzer v. Van Valzah, 95 Ind. 128, 138; Railsback v. Greve, 58 Ind. 72; Brownlee v. Hare, 64 Ind. 311; Hammon v. Sexton, 69 Ind. 37; Fouty v. Morrison, 73 Ind. 333; Morris v. Stern, 80 Ind. 227, French v. State, 81 Ind. 151; Shimer v. Butler University, 87 Ind. 218.

² Sheffield, etc. Ry. Co. v. Gordon, 151 U. S. 285, 293, 14 Sup. Ct. R. 343; Scotten v. Sutter, 37 Mich. 526; Nay v. Byers, 13 Ind. 412; Fellenzer v. Van Valzah, 95 Ind. 128.

³ Ohio, etc. R. Co. v. Cope, 36 Ill. App. 97; Snell v. People, 29 Ill. App. 470; Louisville, etc. R. Co. v. Harlan, 31 Ill. App. 544; Grimley v. Donahue, 36 Ill. App. 550; Patterson v. Folsom, 30 Ill. App. 435; Robertson v. Morgan, 38 Ill. App. 137; Wheeler Chemical

Co. v. Alexander, 30 Ill. App. 502; Weatherford v. Wilson, 3 Ill. 253; Rowan v. Dosh, 5 Ill. 460; Cook County v. Calumet, etc. Canal, etc. Co., 131 Ill. 505, 23 N. E. 629; Mt. Vernon v. Lee, 36 Ill. App. 24.

⁴ Kleyla v. State, 112 Ind. 146, 13 N. E. 255; Harvey v. Smith, 17 Ind. 272; Brickley v. Weghorn, 71 Ind. 497; Sesengutt v. Posey, 67 Ind. 408, 33 Am. R. 98; Gazette Printing Co. v. Morss, 60 Ind. 153; McDonald v. Elfes, 61 Ind. 279; Ingel v. Scott, 86 Ind. 518; Central Union Tel. Co. v. State, 110 Ind. 203, 10 N. E. 922; Barley v. Dunn, 85 Ind. 338; Longworth v. Higham, 89 Ind. 352. But see People v. Henokles, 137 Ill. 580, 27 N. E. 602; also Harris v. Tomlinson, 130 Ind. 426, 30 N. E. 214.

not show how much was admitted and hence amounts to nothing.¹

§ 472. Evidence must be returned — Continued.— Not only must the certificate of the master show a return of all the evidence admitted, but the report itself must not be inconsistent with such statement. A report may be ambiguous and inconsistent upon its face and yet, if the exceptions go only to the correctness of certain items allowed or disallowed, be approved by the court. The master's certificate may state that he returns all the evidence taken by him, yet the report on its face may show that he heard other evidence than that reported by him. This will not invalidate his findings, where no exceptions are taken on this ground, but simply relate to the propriety of allowing certain credits.² If it should appear, however, that the evidence omitted related to the contested items the rule would be different. A party, therefore, who excepts to a master's findings of fact should see that the evidence is properly returned and certified. If the master only returns the evidence on request of the objecting party, he should seasonably make such request, and if the master fails to comply with his request he should make application to the court for assistance. A failure to so request the master constitutes negligence on his part not to be encouraged by the court.³ Where a master is not required by statute, nor the order of reference, to report the evidence, and the question is a matter of fact to be ascertained by the master from all the evidence submitted to him, and he makes no report of evidence, and is not requested by either party to report it, his conclusion is final. In such a case the court refused to re-refer it to enable the parties to have the evidence reported.⁴ The proper remedy is not by exception, but by motion for a rule upon the master to return the required evidence, or to set aside the master's report and re-refer the cause with further directions. If the master fails to return the evidence with his report, where he has been di-

¹ Fellenzer v. Van Valzah, 95 Ind. 128; Goodwine v. Crane, 41 Ind. 335. See also Sidener v. Davis, 69 Ind. 336; Woollen v. Wishmier, 70 Ind. 108; Baltimore, etc. R. R. Co. v. Barnum, 79 Ind. 261.

² Pearson v. Darrington, 32 Ala. 227, 238.

³ For form of certificate see *ante*, § 403.

⁴ Sparhawk v. Wills, 5 Gray, 423, 431; Boston Iron Co. v. King, 3 Cush. 400, 405; Adams v. Brown, 7 Cush. 220, 222.

rected by the court to return the whole evidence, or where by statute, as in Illinois, he must return the whole evidence, or where he has not sent the evidence in support of, or bearing upon his finding, when requested so to do, the irregularity cannot be reached by exceptions. Objections of this character should be brought before the court by motion to refer the report back to the master on those points, or that he send up the evidence required. They are not the subject of exception.¹ Such failure upon the part of the master is good ground for setting aside his report.² If any evidence is omitted the presumption is that it was material, hence the party need not support his motion by a showing of the testimony omitted.³

§ 473. *Preparation for hearing.*—When the master has made his final report he files it in the office of the clerk of the court, or delivers it to the party in whose favor he has made his findings, who files it. If objections have been filed with the master, he notes those that have been allowed, and, also, the fact that he modified the original draft of his report in accordance, and, also, that the other objections are disallowed, and returns all of them with his report. The party who filed the objections with the master then files his exceptions with the clerk, or stipulates with the other party that the objections filed with the master shall stand as exceptions. Either party may then have such exceptions set down for hearing.⁴ Exceptions to a master's report must be regularly set down for hearing, and due notice thereof given to counsel.⁵

Form of Notice.

STATE OF ILLINOIS, } County of Cook. }	ss. In the Superior Court of Cook County. To the September term thereof, A. D. 1902.
George M. Baker } v. } Henry T. Barnes. }	Gen. No. 184,642. Term No. 6,284. In Chancery.

To *Erasmus Wilson*, solicitor for defendant in above cause:

You are hereby notified that I have filed exceptions to the master's report in the above entitled cause, and that on Mon-

¹ Miller's Adm'r v. Miller, 26 N. J. Eq. 428. But see Schnadt v. Davis, 185 Ill. 476, 488, 57 N. E. 652.

² McGillis v. Slattery, 53 Ind. 44.

³ Schnadt v. Davis, 185 Ill. 476, 488, 57 N. E. 652.

⁴ 1 Newl. Ch. Pr. 845-46; Gildart v. Moss, 4 Ves. 617; Miller v. Miller, 26 N. J. Eq. 428.

⁵ Morris v. Taylor, 28 N. J. Eq. 131,

135.

day, the 22d day of September, A. D. 1902, at 10 o'clock in the forenoon, I shall appear before Judge Chetlain, in the room usually occupied by him as a court-room, and will then and there, or as soon thereafter as counsel can be heard, move the court to set the same down for hearing, at which time and place you can appear if you see fit to do so.

Dated this September 18, 1902.

JOHN K. BROWN,
Solicitor for Complainant.

Received a copy of above notice this September 18, 1902.

ERASMUS WILSON,
Solicitor for Defendant.

The above form is where the exceptant moves to set his own exceptions down for hearing. Where the motion is made by the opposite party the notice must be changed accordingly.

In the larger cities of the country the courts have regular "Contested motion calendars," in which all contested motions are entered in their order; and regular days are set apart for hearing contested motions. The party desiring to call up the exceptions for hearing gives the opposite party notice and has the matter placed on the contested motion calendar. If it is known that an unusual amount of time will be required, the matter is set down for a particular day, or, by the direction of the court, it is placed upon the regular-trial calendar, to be called in its turn; or, if the case is one of emergency, or of great importance, the court may set it down for hearing at once.¹ After the matter has thus been set down for hearing or placed upon the contested motion calendar, counsel, if he has not already done so, should make preparation for the hearing. To do this properly requires that he should:

First. Make a careful abstract of the pleadings and the evidence.

Second. He should prepare a careful brief of the authorities to be used on the hearing.²

Unless this preliminary work is done counsel will find it impossible to make a proper presentation of the question involved, and will also require of the court an amount of time and labor which it can ill afford to devote to the matter. Courts are con-

¹ For method of setting exceptions down for hearing before chancellor, notice, etc., in New Jersey, see *Morris v. Taylor*, 23 N. J. Eq. 131.

² For full instructions as to the making of briefs and abstracts, see *post*, § 589 *et seq.*

stantly complaining of the necessity of "wandering through the whole evidence" in order to determine the case on its merits, or otherwise affirming the action of the master, or court below, without such examination. This may be easily avoided by simply requiring such labor to be performed by counsel. To assume that the court is under the necessity of doing this work is to assume one of two things: either that no abstract has been furnished at all, or that the abstract furnished is wholly insufficient.

A chancery rule of the superior court in Chicago provides as follows:

"In all cases heard in this court, except where otherwise determined by the court, the parties shall prepare an abstract or abridgment of their respective pleadings, and of the evidence, when the same shall have been taken by deposition or before a master in chancery, and such abstract of the pleadings and evidence shall be read on the hearing in lieu of the original pleadings and depositions."

The rules of courts generally provide for such abstracts. In the oral argument before the chancellor, or in the briefs submitted by counsel, this abstract alone is cited, unless, for some special reason, it is thought necessary to ask the court to look at some particular part of the record, in which event the attention of the court is called to the precise page where it is found. The rules of the higher courts also provide that the appellant or plaintiff in error shall make an abstract of the record, which abstracts are printed and laid before the judges for the express purpose of avoiding the necessity of their "wandering through the whole record." In the upper courts, as in the lower, in oral arguments of counsel as well as in their briefs, counsel refer alone to the abstract, unless, as before suggested, some special reason exists calling for the personal inspection of some part of the record. This work should be faithfully performed by counsel, and it is the duty of the court to see that it is so done. The court should never forget that the object, and the sole object, is to see that the final decree executes "exact and equal justice between the parties." If the trouble is *insufficient evidence* upon material points, or if the objections filed with the master are *vague, indefinite and uncertain*, the chancellor should refer the cause back to the mas-

ter with directions to hear further evidence, or to permit the objections to be amended, or additional ones filed, as the case may be. The slipshod manner in which one-half the cases are tried should not be tolerated by the court. In justice to the court, to counsel, and especially to parties litigant, the courts should see that both masters and counsel discharge their respective duties fairly, faithfully and in a business-like manner. A case disposed of otherwise than upon the merits because labor which the law requires the counsel or master to perform has not been done is never justifiable. Such a course makes the innocent client suffer the punishment. "Courts are created for no such purposes, but to administer justice, unless prevented by stern and unyielding rules or positive law."¹

§ 474. Preparation for hearing — Continued.— It is only by reason of failure to properly discharge the duties of counsel that either the chancellor, or judges of the higher court, are compelled to "wander at large into the evidence in order to ascertain whether by possibility the master was wrong in his conclusion,"² or otherwise decline to pass upon the merits. In commenting upon this difficulty and its proper remedy the courts have frequently added confusion where before all was clear. The case of *Mahone v. Williams*, 39 Ala. 202, may be taken as a fair sample of this class. The court referred to the "grossest irregularities in the proceedings in reference to matters of account before the register, and in his report, and in the exceptions to it," deploring the growing inattention to rules that govern in such matters, and the imminent danger that the administration of justice by the chancellors and the higher courts would be utterly defeated unless the increasing evil could be remedied, as a justification for the attempt on the part of the court for calling attention to the rules governing such proceedings, and then add: "We have therefore endeavored in this case to set forth, with more than usual particularity, some leading rules and principles, an attention to which will simplify the practice, facilitate and aid in the administration of justice, alleviate the labors of the court, and enable the chancellor and this court on appeal to give each assailed de-

¹ *Tucker v. Conwell*, 67 Ill. 552, 558.

² *Donnell v. Col. Ins. Co.*, 2 Sumner, 366, Fed. Cas. 8,987.

cision of the register an intelligent and satisfactory revision." The court, for the purpose of illustrating the rule, quote Chief Justice Marshall's statement that "exceptions are to be regarded only so far as they are supported by special statements of the master, or evidence which ought to be brought before the court by reference to the particular testimony on which the exceptor relies,"¹ and afterward refer to what Judge Story says, that, "when exceptions are taken, the evidence, which furnishes the ground of the exception, should be required by the party excepting to be *stated* by the master." From these and other similar statements referred to, the court lay down the rule that "each exception itself should designate the objectionable item, and point to the evidence itself by which it is designed to support it." Bearing in mind the fact that in Alabama it is not proper for the register to return any of the evidence taken before him to the chancellor except upon request of the parties, we can see at once the difficulty in complying with the rule. The exception, of course, must designate the objectionable item. The rule requiring the exception itself to point out the evidence relied upon to support it was intended, perhaps, to supersede the necessity of abstracting the evidence, but we submit that a far more satisfactory course is for counsel to furnish abstracts. In Illinois, and generally in the courts of this country, it is not proper "to plead the evidence in the exception," but it is furnished to the court by means of an abstract.²

§ 475. *New evidence—When admitted.*—The case must stand or fall upon the record as made by the master. The hearing before the chancellor is confined absolutely to a review of the action of the master, and is in no sense a retrial of the cause. The court on the hearing of exceptions to the master's report will not hear evidence that was not before the master, nor undertake to decide a different case, or what the master's report should have been on a different state of facts,³ but the report must be tried by the evidence produced before the mas-

¹ *Harding v. Handy*, 11 Wheat. 126.

² *Schwarz v. Sears*, Walker Ch. (Mich.) 19, 22; *Ridifer v. O'Brien*, 8

³ Upon the importance of abstracts and briefs and the proper preparation of same, see *post*, § 539 *et seq.* Madd. 43; *Byington v. Wood*, 1 Paige, 145.

ter, ¹, unless it appears to be wrong when judged by that ² must be sustained. Until error is made clear the master's conclusions must be regarded as correct.¹ Where the cause is referred to the master to take proofs and report his conclusions thereon, the rule is absolute. In such a reference all the testimony *must* be introduced before the master, otherwise the passing upon exceptions to the master's report would not be a review of *his* findings, but the court would be trying another and different case than that made before the master.²

The supreme court of Alabama go so far as to hold that not even the answer can be considered, unless it was read in evidence before the register, and that it is, therefore, necessary for the parties to give in evidence such parts of the pleadings and proofs taken before the hearing as they may deem material.³ The regular and proper practice is for the parties to introduce all their evidence, both oral and written, before the master. One of the most important objects of a reference is a saving of time and labor on the part of the court. This is but partly attained if the parties are permitted to divide their testimony, taking a part before the master and the remainder before the court. "Examinations at the hearing," says Chancellor Kent, "ought to be sparingly used, or they would tend very much to delay and embarrass business, by changing the whole practice of the court, and giving it a *nisi prius* character." He even says: "In my opinion no paper whatever ought to be proved at the hearing without satisfactory reasons being assigned why it was not proved in the regular way before the examiner."⁴

As quaintly said by a chancellor of Tennessee: "If this

¹ Van Ness v. Van Ness, 32 N. J. Eq. 669; Clark v. Condit, 21 N. J. Eq. 322; Haulenbeck v. Conkright, 23 N. J. Eq. 407; Davis v. Davis, 2 Atk. 21, 2 Smith's Ch. Pr. 344, 345; 2 Barbour, Ch. Pr. 547; Pr. Reg. Ch. 382; 2 Maddock's Ch. Pr. 390.

² Cox v. Pierce, 120 Ill. 556, 559. 12 N. E. 194; Wall v. Stapleton, 177 Ill. 857, 360, 361, 52 N. E. 477; Prince v. Cutler, 69 Ill. 267, 272; Allison v. Perry, 130 Ill. 9, 14, 22 N. E. 492; McMannomy v. Walker, 63 Ill. App.

259, 277; Smith v. Billings, 62 Ill. App. 77, 89, 170 Ill. 543, 49 N. E. 212; Schumann v. Helberg, 62 Ill. App. 218, 221, 543, 549; Gould v. Elgin Banking Co., 36 Ill. App. 390, 394; Foster v. Van Ostern, 72 Ill. App. 307, 312; Brueggestratt v. Ludwig, 82 Ill. App. 435, 447.

³ Mahone v. Williams, 39 Ala. 202, 224, citing Daniell's Ch. Pr. 1498.

⁴ Quoted in Bachelor v. Nelson, Walk. Ch. (Mich.) 449.

could be done all references would be blown up.”¹ If additional material evidence is discovered after it is too late to present the same to the master, and the interest of justice requires that it should be heard, the proper remedy is a re-reference to the master, with directions to admit the evidence and reconsider his report.² The chancellor’s duty is to review the action of the master and not try the cause *de novo*. If newly-discovered evidence is necessary to be heard in the interest of justice, the cause should be re-referred to the master for that purpose, who will then reverse or modify his findings in the light of new facts proven, if required so to do, and the parties may again except to his findings and bring all proper questions again before the chancellor for review in the regular way. So, too, upon the hearing of objections to the master’s report before the master his duty is limited to a review of his previous work, as called in question by the objections, and for that reason no additional evidence will be admitted.³

§ 476. **New evidence — When admitted — Continued.**— The rule being as stated in the last section, it is not error for the trial court to refuse to consider depositions that had not been used before the master;⁴ and, on the other hand, if the trial court violates the rule by admitting evidence on the hearing, it is not error, provided such evidence is merely cumulative. In a case of this kind the supreme court of Illinois said: The chancellor in this case required the defendant in error to introduce certain testimony as additional evidence in open court, after the coming in of the master’s report. This evidence was merely of a cumulative character, and did not in any manner change the conclusion reached as the result of the master’s report, for the decree entered by the chancellor was the same as that recommended by the master before the coming in of this evidence. When the court required the defendant in error to introduce this testimony he did not deprive the plaintiffs in error of any right to introduce evidence to rebut it, and the evidence thus introduced, being merely cumulative, is not cause for a reversal, inasmuch as the decree was

¹ White v. Cox, 4 Hay. (Tenn.) 214.

³ Byington v. Wood, 1 Paige, 145;

² White v. Cox, 4 Hay. (Tenn.) 214;

² Barbour, Ch. Pr. 547.

Wall v. Stapleton, 177 Ill. 357, 360, 361,
52 N. E. 477.

⁴ Third Nat. Bank v. National
Bank, 86 Fed. 852.

clearly right on the evidence before the master, aside from this additional cumulative evidence.¹

Although the rule is as stated, yet there are some exceptions. In this case, as in all others, when the reason of the rule ceases the rule itself ceases. Anciently the rule requiring the party to put in his evidence before the master or examiner was very stringent, but courts are now more liberal; yet Chancellor Kent says: "These examinations, at the hearing, ought, undoubtedly, to be very sparingly used, or they would tend very much to delay and embarrass business, by changing the whole practice of the court, and giving it a *nisi prius* character."² It is true that this was said of testimony taken before an examiner, but no reason exists why the same rule will not apply upon a hearing of exceptions to a master's report. If the master erroneously admits evidence of the contents of a lost instrument without sufficient proof of its loss, certainly such proof ought to be supplied on the hearing. No good could come from a re-reference, the master having already considered the evidence in making his findings. The same rule would apply as to the identification of documents, proof of handwriting and the like.³

So, also, additional evidence may be introduced on the hearing by consent.⁴ In one state, at least, the rule is wholly changed by statute. In Georgia issues of fact raised by exceptions to the master's findings are tried by a jury and the exceptant is not confined to the evidence reported by the master, but may offer evidence *aliunde*.⁵ In that state it is provided by the Code, section 4598, that in trial of issues of fact raised by exceptions to an auditor's report "the same shall be determined upon the testimony reported by the auditor, except that admissible material evidence introduced and not reported, and evidence improperly excluded, shall be submitted to the jury, and all inadmissible evidence shall be excluded from their con-

¹ Wall v. Stapleton, 177 Ill. 357, 360, 361, 52 N. E. 477.

² Consequa v. Fanning, 2 John. Ch. 481.

³ Holdridge v. Bailey, 4 Scam. 126; 1 Barb. Ch. Pr. 809 310; 1 Smith's Ch. Pr. 839; McClay v. Norris, 4 Gilm. 870.

⁴ Harding v. Harding, 180 Ill. 481, 54 N. E. 587.

⁵ Keaton v. Mayo, 71 Ga. 649, 651; Poullain v. Poullain, 76 Ga. 420, 441; Lamar v. Allen, 108 Ga. 158, 163, 164, 83 S. E. 958; Code, sec. 4595.

sideration." It is further provided that "no new testimony shall be considered except in those cases where, according to the principles of law, a new trial would be granted for newly-discovered evidence." And it is further provided that (Code, section 4600) "only so much of the evidence reported as is material and pertinent to the issue then on trial shall be read to the jury;" and it is further provided, section 4586, that all evidence offered and deemed by the auditor, upon a reference, inadmissible shall, nevertheless, be reported by the auditor, and if, upon exception filed to his ruling thereon, the evidence is adjudged to be admissible, the same may be considered upon the trial of exceptions of fact.

The reason for refusing to allow any additional evidence to be heard before the chancellor upon the hearing of exceptions to a master's report is that it would result in a retrial of the case and thus, in a great measure, defeat the object of a reference. But, under the Georgia Code, provision is made for the trial of issues of fact raised by exceptions to a master's findings by a jury. Under the English practice a hearing was before a chancellor who had no jury, and instead of the chancellor hearing new evidence, if a case required it, he recommended the case to the master for that purpose. But, in Georgia, such juries are *quasi*-appellate auditors, or masters, upon the exceptions taken, and hence new evidence may be introduced before them, instead of referring a case back to a master.¹ In that state, on the trial of exceptions of fact before a jury in an equity cause, it is not proper to introduce in evidence the entire report on the law and facts, including the argument of the master on legal questions. While these are proper for the consideration of the court on the legal exceptions, of which he alone judges, it is not evidence for the jury.²

§ 477. Argument—Right to open and close.—The exceptions, or objections to a master's report where they may be made without exceptions, are argued like any other points in the case, the exceptant being, as a general rule, entitled to open and conclude the argument, and such exceptions as are either

¹ Roberts v. Summers, 47 Ga. 434, relative to hearing of exceptions to a master's findings by a jury, see 439; Code, secs. 4598, 4599.

² Heard v. Russell, 59 Ga. 25, 50. *post*, § 478.
For peculiar statutory provisions

overruled or sustained should properly be set forth in the decree.¹ As the master's findings are presumed to be correct and the burden upon the attacking party to point out the error and convince the court that the exceptions are well taken, the exceptant has the right to open and close the argument. The exceptions are opened *seriatim* by counsel of the exceptant, who reads so much of the order of reference, of the report and the evidence, and of the exceptions, as he deems necessary. He is then followed by counsel of all the parties interested in upholding the report, and against the allowance of the exceptions, but no one will be heard in *support* of the exceptions but counsel for the exceptant. The same rule applies in this instance as in an appeal where the counsel of all parties may support the decree, but only the counsel of the appellant can be heard to support the appeal. The reason is the same in both cases, and as in the one, a party aggrieved by a decree cannot be heard against it unless he has appealed himself, so neither can a party dissatisfied with a master's report be allowed to avail himself of the opportunity, on the exceptions of another party, to urge his own, or to support the objections of another.² After all counsel are through who are entitled to be heard in support of the report counsel for the exceptant closes. In Georgia it is provided by the code that the report shall be taken as *prima facie* correct, and the burden be upon the party making the exception, who shall have the right to open and conclude the argument: and it is further provided that "in all cases where both parties file exceptions of fact, the party against whom judgment would be rendered, if the report were approved, shall be entitled to open and conclude the argument."³ This is the regular practice independently of any statute or rule of court. Where both parties except to the findings of a master, it sometimes becomes a question as to which has the right to open and close the argument upon hearing of the exceptions. In a Georgia case it was held that where the exceptions of the plaintiff were of minor importance, while the exceptions of the defendant went to the whole merits of the case, the latter was entitled to open and

¹ 2 Barton, Ch. Pr. 657.

² 2 Smith's Ch. Pr. 344.

³ Code, secs. 4595, 4597; *Lamar v. Allen*, 108 Ga. 158, 164, 83 S. E. 958.

close the argument.¹ The method of disposing of exceptions upon a hearing, stated more in detail, is as follows:

First. The exceptant opens and concludes the argument. He should first state briefly the matter in controversy — what the suit is about.

Second. He should read or state the substance of the order of reference, thus showing to the court the matter submitted to the master. If necessary he should read or state sufficiently from the pleadings to show more fully the master's precise duties under the issues.

Third. He should read the finding of the master against which his first exception is directed.

Fourth. He should then read the evidence in support of such exception.

Fifth. He should submit his argument in support of such exception, citing his authorities, if any.

Sixth. The counsel for the other party should then be permitted to read such portions of the evidence as, in his judgment, sustains the finding, followed by his argument and citation of authorities against the allowance of the exception.

Seventh. The exceptant's counsel then concludes the argument, after which the chancellor should announce his decision.

In this manner all the exceptions should be taken up and disposed of *seriatim*.²

Upon such a hearing the exceptant must confine himself to the exceptions, and will not be allowed to raise other objections to the report. The exceptions and the argument must be founded on the facts stated in the report, or in the accompanying proofs; and evidence which was not before the master cannot be read or considered. If a party has new evidence he should not except, but move the court to recommit the report to the master.³ What is meant by this is that a party will not be permitted to go beyond or outside of his exceptions to raise other or different objections which could only be raised

¹ Culver v. Hood, 97 Ga. 550, 557, 25 S. E. 844; Pingree v. Coffin, 12 Gray, 288, 315; Goddard v. Cox, 1 Lea, 112; Musgrove

² Gibson, Suits in Ch., § 596 and notes; v. Lusk, 2 Tenn. Ch. 576; 2 Daniell, Ch. Pr. (6th ed.) 1817, notes.

³ Kilbee v. Sneyd, 2 Molloy, 186, 289;

by appropriate exceptions. Of course, if there is any valid objection to a finding, which might be urged without an exception, it may be insisted upon. For example, it may be insisted that the facts are incontrovertible and that the finding is, therefore, but a legal conclusion, and is erroneous, or any other error may be insisted upon which appears upon the face of the report, such as an error in computation and the like.

§ 478. **Jury trial.**—The method of reviewing a report in Georgia is different from that of any other state in the Union. It is provided by the Code, sections 4595, 4596, that issues of fact raised by an exception to the report in equity cases shall be tried by jury, when such exceptions are approved by the judge; the language of the Code being: "In equitable proceedings, where an auditor has been appointed by the superior court, if the judge approve any exception of fact, the same shall be submitted to a jury, as in other cases, with the same presumptions, burdens, and right to open and conclude." In that state it is held that exceptions to the master's report of findings of fact in an equity cause cannot be submitted to a jury until the same are approved by the judge. Under the provisions of the Code a party is not entitled to have his exceptions of fact to the report of the master in an equity case passed upon by a jury unless the judge approves of such exceptions.¹

Issues of fact raised by exceptions to the findings of a master in equity cases are not to be passed upon by a jury, unless approved by the court, and its discretion in refusing to approve such exceptions will not, unless manifestly abused, be controlled by the upper court.² It is held that the authority of the judge cannot be exercised arbitrarily in passing upon such exceptions. So to do would be an abuse of discretion. Clearly, under the statute, "the judge is not bound in every equity case, where the evidence before the auditor was conflicting, to allow the jury to pass upon exceptions of fact."³ Where, under the provisions of the Code, issues of fact are raised by exceptions to a master's report for trial by jury, it

¹ *Vaughn v. Fitzgerald*, 112 Ga. 517, 37 S. E. 752; *Phillips & Co. v. De Bray*, 112 Ga. 628, 37 S. E. 887; *Lamar v. Allen*, 108 Ga. 158, 33 S. E. 958. ² *Byrom v. Gunn*, 102 Ga. 565, 566, 31 S. E. 560. ³ *Brown v. Georgia Mining Co.*, 106 Ga. 516, 32 S. E. 601.

is the duty of the judge to examine the report, and if it does not appear that error has been committed, he should approve the report and dismiss the exceptions.¹ Under the Code the jury, returning a verdict upon issues of fact raised by exceptions to the master's report, "shall return a verdict on each exception *seriatim*."² The requirement of the Code is positive that the jury must pass *seriatim* on the exceptions, and this provision cannot be met by finding an aggregate amount in favor of one party, or finding generally in favor of the other.³ This trial by jury in an equity case is purely a statutory right and not a constitutional one.⁴ The argument and hearing before the jury are the same as in any other case.

VIII. DUTY OF THE COURT.

§ 479. Duty of the court.—During the progress of the argument the chancellor notifies counsel as to his holdings upon each exception as presented, and, at its conclusion, announces his decision, or takes the matter under advisement and announces it later on, whereupon counsel prepares an order in accordance therewith. The decision of the chancellor must be upon one or the other of the following lines:

First. Unless the exceptant, upon whom the burden rests, has satisfied the chancellor, with that degree of certainty required by law, that the report is erroneous in some particular, it will be confirmed.⁵

Second. Error may be clearly shown to exist, and yet it may belong to that class designated as "harmless errors," in which event the report will be confirmed.

¹ Mackenzie v. Flannery, 90 Ga. 590, 595, 16 S. E. 710.

² Code, sec. 4600; Mason v. Commissioners, 104 Ga. 35, 42, 30 S. E. 518.

³ Poullain v. Poullain, 72 Ga. 412, 418; Mayo v. Keaton, 78 Ga. 125, 126, 2 S. E. 687.

⁴ Mahan v. Cavender, 77 Ga. 118, 120; Poullain v. Brown, 80 Ga. 27, 30, 5 S. E. 107; Mackenzie v. Flannery, 90 Ga. 590, 595, 16 S. E. 710; Central Trust Co. v. Thurman, 94 Ga. 735, 750, 20 S. E. 141; Hearn v. Laird, 103

Ga. 271, 276, 29 S. E. 973; Bemis v. Armour Packing Co., 105 Ga. 293, 294, 31 S. E. 173; Lamar v. Allen, 108 Ga. 158, 162, 33 S. E. 958.

⁵ This must be taken with this qualification—that the court may, independently of objections made by counsel, be dissatisfied with the report and either make such corrections as the case may require, if in his power, or re-refer the cause to the master with further directions.

Third. Error may be clearly established, and yet be of such character that the court may and ought to correct, in which event the court will make the correction without a re-reference.

Fourth. The report may be shown to be clearly erroneous and the error of such a character as to require a re-reference, in which case the cause will be re-referred, with further directions.

Fifth. The court may be convinced that the order of reference itself is erroneous, and may modify the same and re-refer the cause, or may set the order aside and dismiss the bill.

Before starting upon the discussion of the various duties of the court, as outlined above, it is well to again caution both court and counsel against the too common mistake of treating a hearing upon exceptions as an opening up of the whole case for rehearing. An error too frequently fallen into by attorneys, when defeated in the master's office after a contest lasting several months and often years, is that, upon the return of the master's report, the chancellor will go into the whole case again — in short, that the case will be retried upon its merits, precisely as if there had been no hearing before the master, in which event the only advantage of the reference would be to take and return the evidence for use before the chancellor. No such duty devolves upon the chancellor. Mr. Justice Woodbury, of the United States circuit court, in commenting upon the weight to be given to the master's findings, says:

“In respect to the exceptions themselves, most of them seem chiefly to rest on an impression that the court, when a master's report is returned, should retry and re-examine and decide on all the questions of fact, as well as law, raised before the master.”

“But we regard the office of a master in chancery somewhat like that of a jury in the courts of common law. Originally there were twelve masters in number, and their duties were not only limited, in the progress of time, to matters of fact, but chiefly to those of mere debt and credit, and computation of interest.”

“When they have once decided on these facts, and no legal question is involved in them, their report should stand probably without amendment here, or without recommitment, unless

reasons exist for either, as strong as will justify setting aside a verdict."

"If there has been a clear mistake, or a palpable abuse of power, either of them ought to be corrected. But if the court should inquire or act beyond that, as to matters of fact, the office of master would prove but little aid in the administration of justice — the court being compelled to go over all the facts again, and thus their labors be greatly and unnecessarily increased."

"When a party has enjoyed one full hearing as to the facts involved in his claims of debt, credit, interest and kindred topics, there seems little justification for going into another, unless the master has clearly fallen into a mistake or clearly abused the power confided to him. Without such a limitation, no prospect would exist of putting an end to litigation."¹

Again, it is just as important to avoid the mistake of an opposite character — that of ignoring or shirking the responsibility of carefully and thoroughly examining all the evidence in support of each exception taken. The rule is well stated in a Pennsylvania case as follows:

The findings of fact made by a master upon contested evidence heard before him, while entitled to great weight, are not conclusive; but the chancellor, upon the coming in of the report, as to such findings as are objected to, is bound to examine the evidence and determine for himself what the facts are, and, whether he agrees or disagrees with the master's findings, on appeal the appellate court in like manner must determine whether the findings of fact are right. When the appellate court is satisfied that such findings are without proofs, or material facts established by the proofs have not been found, it follows that there has been a plain mistake, and the court should not hesitate to correct the same. In the several stages of the proceeding there is no place for a perfunctory consideration of the evidence relative to the facts in dispute.²

§ 480. Weight given to master's report — Master's superior opportunities. — A proper understanding of the duty of the court upon a hearing of exceptions to a master's report re-

¹ *Mason v. Crosby*, 3 Woodb. & M. 362, 1 Atl. 380. See *Witt v. Cuenod*, 258, 269, 270, Fed. Cas. 9,236. 9 N. M. 143, 59 Pac. 828.

² *Worralls' Appeal*, 110 Pa. St. 349,

quires that we should first determine the weight to be attached to a master's findings. In a former section of this chapter we have already seen that the master's report is presumptively correct, and that the burden rests upon the dissatisfied party to point out the error and satisfy the court of its existence, but the degree of weight to be given to the findings of the master has not so far been touched upon. The holdings of the courts are not uniform on this subject, and, in passing upon the subject, many loose statements have been made. Every presumption is in favor of the findings of the master.¹ This presumption extends to every conclusion of the master, whether of law or fact, indeed to every official act. This is but an application of the rule applied to the official acts of all public officers.² It follows, therefore, that in determining the value of the master's report or the weight to be attached to it, "the court will not presume that the master has erred in his finding of fact without testimony that would clearly justify it in coming to that conclusion."³ In Georgia it is provided by the Code, section 4581, that the report of an auditor "shall be *prima facie* the truth, either party having the liberty to except;" but this doctrine applies independently of any statute or rule of court, otherwise the office of master in chancery would be a hindrance instead of an aid to the court.

While the foregoing is true as to all official acts of the master, it must be remembered, in discussing the weight to be given to his report, that the same degree of weight does not attach to all his acts, but varies, depending upon the matter in question and surrounding circumstances. The degree of weight ranges from cases where his action is well nigh conclusive, to others where there is a bare presumption in his favor. His report is sometimes spoken of as conclusive, but, "properly speaking, no report is conclusive." This would be to make

¹ Medsker v. Bonebrake, 108 U. S. 66, 2 Sup. Ct. R. 451; Tilghman v. Proctor, 125 U. S. 186, 8 Sup. Ct. R. 894; Callaghan v. Myers, 128 U. S. 617, 668, 9 Sup. Ct. R. 177; Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. R. 855; Chandler v. Pomeroy, 87 Fed. 262; Newcomb v. Wood, 97 U. S. 581, L. Ed., Book 24, 1086; Heckers v.

Fowler, 69 U. S. (2 Wall.) 123, L. Ed., Book 17, 760; U. S. v. Farragut, 89 U. S. (22 Wall.) 406, L. Ed., Book 22, 870; Jenkins v. Eldredge, 8 Story, 299, Fed. Cas. 7,267.

² See further on this subject *ante*, § 423.

³ Chandler v. Pomeory, 87 Fed. 268.

the judgment of a subordinate officer, performing an ancillary service, superior to that of the court.¹ The additional weight given to certain findings or conclusions of the master is not based on any supposed superior knowledge or ability on his part, but solely and only on his superior opportunities for arriving at the truth. These may be divided into three classes:

First. His superior advantages in working out details. This applies especially to complicated cases of accounting, the master being able to devote an amount of time to the working out of details in such cases that the court could ill afford with any consideration for the other business of the court.

Second. The advantage of a personal examination of the matter in controversy, such as the *locus in quo*.

Third. In cases of contested questions of fact dependent on the oral testimony of witnesses, the advantage of seeing the witnesses upon the stand, hearing them testify and of observing their demeanor while testifying.

The superior opportunities of the master for arriving at the truth in the latter case are of special importance. Of the credibility of the witnesses the master is the most proper judge. The conclusions of a master, who has examined and seen the witnesses, are always regarded in equity as entitled to great respect, and where there is conflicting evidence, and his conclusions are clearly supported by competent witnesses who are unimpeached, his report will not be set aside because there is conflicting testimony, unless the weight of such testimony, on account of the great number of the witnesses and the nature of their evidence, is such as to make it clear that the master has erred.² Distinguished judges have set forth these advantages in strong terms.

The chancellor of New Jersey gives the following excellent test for determining the weight to be given to a master's report. In speaking of the report in a case before him he says: "The opportunity afforded the master, in arriving at a correct conclusion, was much more favorable than that afforded me. It is true, I have the same evidence before me upon which the master made up his judgment. The testimony of

¹ Phillips's Appeal, 68 Pa. St. 130, 138.

² Haulenbeck v. Cronkright, 23 N. J. Eq. 407, 412, 413.

witnesses, generally, appear all alike upon paper; and yet, every one at all acquainted with the investigation of controverted facts, where the evidence is conflicting, appreciates the importance of seeing the witnesses confronted with each other, and of hearing their testimony as they give it. Where a correct decision depends on the degree of credit to be attached to the witnesses examined, the appearance and manner of the witnesses are almost indispensable in forming a correct and satisfactory judgment. I do not mean to be understood as saying that the decision of a master should be considered as conclusive upon a matter of fact; all I mean to say is, that before the court will interfere with the report of a master, upon a question of fact submitted to him, depending upon the credibility of witnesses, the error of the master must satisfactorily and clearly appear. The court has always acted upon this principle, and I think it the only correct and safe one."¹

§ 481. Weight given to master's report—Master's superior opportunities—Continued.—That the office of master in chancery is one of the most important known in the administration of justice will be universally conceded. His duties are of a careful and responsible nature; he is assistant to the chancellor. There is no question of law or equity, or of disputed fact, which he may not have to decide, or respecting which he may not be called upon to report his opinion to the court. According to the practice of many courts he never reports the evidence, but only his conclusion. He is confronted with the witnesses; he sees their deportment, their manner of testifying, their capacity for acquiring and accurately detailing past occurrences, whereas the court, which only sees the testimony on paper, is denied the opportunity of applying these obvious tests of accuracy and validity.² Every lawyer familiar with chancery practice perfectly understands how important this is in judging of the credibility of witnesses. Not infrequently the change of a phrase, or even a word, gives an effect to the answer of the witness never contemplated by him. When, therefore, a question of fact is referred to a master, depending upon the testimony of witnesses conflicting in their

¹ *Sinnickson v. Breure's Adm'r*, 9 Gratt. 697, 700; *Robinson v. Allen*, 85 N. J. Eq. 659.

Va. 721, 727, 8 S. E. 865.

² *Bowers' Adm'r v. Bowers*, 29

statements and differing in their recollection, the court must, of necessity, adopt his report, unless, indeed, in case of palpable error or mistake.¹

In commenting upon the importance to be attached to the master's report and the reluctance with which courts will interfere with their findings upon controverted questions of fact, the court of chancery of Ontario say: "The master having himself seen the witnesses, having observed their demeanor, and not only their answers, but their mode of answering; their appearance, manner, and the many minor circumstances attending the examination of witnesses which give to, or detract from, the value of oral testimony, had materials for forming a more correct judgment as to the weight to be attached to it than any one from merely reading the evidence can possibly have. If upon an appeal involving the question of the weight to be attached to oral testimony, the judge hearing the appeal should overrule the master, he would run a great risk of being in the wrong; and setting aside the judgment of the master, in a case where, from his superior means of forming a correct judgment, he would be the more likely to be right."² Every presumption is in favor of a master's report, and it cannot be disturbed unless there has been a clear mistake or a palpable breach of power. If the court should inquire or act beyond that, as to matters of fact, the office of master would prove of but little aid in the administration of justice, the court being compelled to go over all the facts again, and thus their labors be greatly and unnecessarily increased.³ The master has many opportunities afforded by observation for judging of the intelligence, character and credit of the witnesses, which cannot be obtained by a dry transcript of the testimony; his findings, therefore, will not be disturbed unless clearly in conflict with the weight of the evidence.⁴ If the rule were otherwise, the services of the master, now so generally employed to pass on questions of

¹ *Bowers' Adm'r v. Bowers*, 29 Gratt. 697, 701; *Robinson v. Allen*, 85 Va. 721, 727, 8 S. E. 865; *Stimpson v. Bishop*, 82 Va. 190, 204; *Magarity v. Shipman*, 82 Va. 784, 787, 1 S. E. 109; *Stuart, Palmer & Co. v. Hendricks*, 80 Va. 601; *Izard v. Bodine*, 1 Stock. Ch. 309.

² *Day v. Brown*, 18 Grant's Ch. R. 681.

³ *Reeside v. Reeside*, 6 Phila. 507, 510.

⁴ *De Cordova v. Korte*, 7 N. M. 17, 91 Pac. 526.

fact, would be of little aid to the court in the administration of justice.¹

§ 482. **Weight given to master's report—Rule in the federal courts.**—While there is great discrepancy in the efforts of the courts to state the rule, yet, probably, there is more uniformity in its application than one would at first suspect. Instead of attempting to formulate a rule, the better plan, probably, will be to submit a number of statements, selected from the opinions of distinguished judges. These may be of assistance to both court and counsel in applying the rule to particular cases as they arise. Probably the best statement of the rule which obtains in the federal courts regarding the weight to be given to a master's findings of fact, where the evidence is conflicting, is found in the opinion in a case decided by the circuit court in the district of Indiana.² In the case referred to the contention of counsel for the exceptants was "that the finding of the master that the injuries complained of resulted from unusual, extraordinary, and unprecedented rainfalls, without negligence on the part of the railway company or its receiver, was contrary to the evidence." This was met by counsel of the other party with the assertion that the evidence on this question was "conflicting, and, in case of such conflict, that the court cannot, or rather ought not to, review the evidence, and find the fact otherwise than reported by the master, even if the court should be of the opinion that the master's finding was contrary to the clear weight of evidence." Upon this question so presented, Mr. Justice Baker, speaking for the court, says:

"The conclusions of the master, depending on the weighing of conflicting testimony, have every reasonable presumption in their favor and are not to be set aside or modified unless there appears to have been error or mistake on his part. *Callaghan v. Myers*, 128 U. S. 617; *Tilghman v. Proctor*, 125 U. S. 136; *Paddock v. Insurance Co.*, 104 Mass. 521; *Richards v. Todd*, 127 Mass. 167. The finding of facts by the master will be regarded as *prima facie* correct, and will not be set aside or modified unless it clearly appears from the evidence reported that there has been a material error or mistake made

¹ Id. See also *Mason v. Crosby*, 3 Woodb. & M. 238, 269, Fed. Cas. 9,236.

² *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 57 Fed. 441, 445.

by him. *Medsker v. Bonebrake*, 108 U. S. 66. The finding need not be wholly unsupported by the evidence to justify the court in modifying or setting aside his report. If the great preponderance of the evidence is in conflict with his finding, it ought not to be accepted by the court as binding upon it. His report, however, ought not to be modified or set aside for light or trivial reasons, nor unless, upon a careful review of the testimony, the court feels a clear and abiding conviction that some prejudicial error or mistake has been committed. After a careful study of the testimony I am in doubt whether the master ought to have found that the rain-falls and flood in question were unprecedented, yet I do not feel such a clear and abiding conviction that he has fallen into error as would justify me in modifying or setting aside his report. He saw the witnesses face to face; he heard them testify, and he had an opportunity to form a more accurate judgment than I can, from the testimony reported, of their intelligence and candor and their knowledge of the matters about which they testified."

The weight to be attached to a master's findings of fact in contested cases, where the witnesses were examined orally in his presence, has been repeatedly passed upon by the supreme court, and so definitely settled as to leave nothing in dispute. For example, it is said by that court that "his conclusions have every presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part. This is the rule laid down by this court in *Tilghman v. Proctor*, 125 U. S. 136, and approved in *Callaghan v. Myers*, 128 U. S. 617, 666, and in *Kimberly v. Arms*, 129 U. S. 512. See also *Dean v. Emerson*, 102 Mass. 480; *McDonough v. O'Neil*, 113 Mass. 92. We see no reason for departing from it, and think this a proper place for its application."¹ And again, in speaking of the same subject, it is said: While the findings of a master are not absolutely binding upon the court, yet, where the evidence is conflicting, there is a presumption in their favor, and they will not be set aside or modified in the absence of some clear error or mistake.² And again, in another case: Findings of the master are to be "taken as

¹ *Camden v. Stuart*, 144 U. S. 104, 118, 119, 12 Sup. Ct. R. 585.

² *Girard Ins. Co. v. Cooper*, 162 U. S. 529, 538, 16 Sup. Ct. R. 879.

presumptively correct, and unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand.”¹ And in still another case the same court say: “In considering the exceptions of the defendants to the masters’ reports in matters of fact, questioning the accuracy of their conclusions in respect to the amount of the defendants’ profits, we have observed the rule recognized and affirmed in *Tilghman v. Proctor*, 125 U. S. 136, 149, that, in dealing with such exceptions, ‘the conclusions of the master, depending on the weighing of conflicting testimony, have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part.’”² In other cases in the federal courts they have expressed themselves emphatically as to the great weight to be given to the findings of fact made by the master under such circumstances. The following are given as examples:

It is well settled that, unless it is clearly and satisfactorily shown that there is error in the finding of the master, the court will not interfere.³

The findings of fact by a master are supported by a strong presumption of correctness, and will not be set aside or modified in the absence of clear evidence of mistake or error.⁴ The rule applicable to a master’s report is that it will not be disturbed except in case of clear error.⁵

The rule, as thus laid down, is followed in the federal courts generally, that is, every presumption is in favor of the master’s report, and, in the absence of a satisfactory showing of bias or clear mistake, the court will accept his findings as correct.⁶ Judge Story says that upon questions of fact the court will

¹ *Crawford v. Neal*, 144 U. S. 585, 12 Sup. Ct. R. 759, citing *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. R. 894; *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. R. 855; *Evans v. State Bank*, 141 U. S. 107, 11 Sup. Ct. R. 885.

² *Callaghan v. Myers*, 128 U. S. 617, 9 Sup. Ct. R. 177.

³ *Stanton v. Alabama & C. R. Co.*, 81 Fed. Rep. 585, 587.

⁴ *Columbus, S. & H. R. Co. Appeals*,

109 Fed. 177, 218; *Lake Erie & W. R. v. City of Fremont*, 84 C. C. A. 625, 92 Fed. 721.

⁵ *Central Trust Co. v. East Tenn. Land Co.* (Cir. Ct. E. D. Tenn.), 79 Fed. 19.

⁶ *Bridges v. Sheldon*, 9 Fed. 34, 35; *Jaffrey v. Brown*, 29 Fed. 476; *Central Trust Co. v. Wabash, etc. Ry. Co.*, 81 Fed. 246; *Central Trust Co. v. Tex. & St. L. Ry. Co.*, 82 Fed. 448;

abstain from any interference with the findings of the master unless clearly satisfied that there has been an unquestionable error.¹

§ 483. Weight given to master's report—Rule in the state courts.—As a general rule the state courts attach equal if not greater importance to the report of the master in all cases of contested questions of fact dependent upon the testimony of witnesses who were examined in the presence and hearing of the master.

In Pennsylvania the same degree of weight is given to a master's findings as to the findings of a chancellor who hears the case in open court without the intervention of a master. The error must clearly appear to justify a reversal. An apparent preponderance of the evidence against the findings is not sufficient to lead to a reversal, if there is testimony which, if believed, will warrant them. The credibility of the witnesses, and in a larger degree the conclusions to be drawn from their testimony, which depend upon their character, intelligence and knowledge of the subject, can be determined much better by the judge or master who hears them than by the judges of the upper court on appeal.² In other cases it is said: The established rule in that state is "that the findings of the master on conflicting evidence, approved by the court, will not be reversed except on clear evidence of mistake."³ And again: Where the question is purely one of fact and the master had the witnesses before him, his findings will not be disturbed unless the court is convinced that his conclusion is wrong. The existence of error justifying a reversal of the master must be

Missouri Pac. Ry. v. Tex. & Pac. Ry., 33 Fed. 803; Welling v. La Bau, 34 Fed. 40; Cutting v. Florida Ry. Co., 43 Fed. 743, 747; Clyde v. Richmond & A. R. Co., 69 Fed. 673; Walters v. Western & A. R. Co., 69 Fed. 706; Farrar v. Bernheim, 75 Fed. 136, 41 U. S. App. 172; Walker v. Kinnare, 76 Fed. 101; 46 U. S. App. 150; Central Trust Co. v. East Tenn. Land Co., 79 Fed. 19; Third Nat. Bank v. Nat. Bank of Chester, 86 Fed. 852; Mason v. Crosby, 3 Woodb. & M. 258, 269, Fed. Cas. 9,236; Foster v. Goddard, 1 Black (U. S.), 509.

¹ Donnell v. Columbian Ins. Co., 2 Sumn. 366, Fed. Cas. 3,987.

² Steinmeyer v. Siebert, 190 Pa. St. 471, 475, 42 Atl. 880; Stockett v. Ryan, 176 Pa. St. 71, 34 Atl. 973; Com. v. Stevens, 178 Pa. St. 543, 561, 36 Atl. 166; Hancock v. Melloy, 187 Pa. St. 371, 41 Atl. 313.

³ Steinmeyer v. Siebert, 190 Pa. St. 471, 475, 42 Atl. 880, 70 Am. St. 641; Stocker v. Hutter, 134 Pa. St. 19, 19 Atl. 427; Brotherton Bros. v. Reynolds, 164 Pa. St. 134, 30 Atl. 234.

plain.¹ In another Pennsylvania case the court say: "Where complicated and disputed accounts have been examined and adjusted by a master, and an account stated between the parties, which has been approved by the court below, this court will not reverse the findings of the master upon the questions of fact involved, and restate the account, except upon clear evidence of plain mistake. Even where the testimony is conflicting, and the merits appear contrary to the master's conclusions, yet the findings will not be set aside, except for clear error."² And yet again the same court, in attempting to lay down the rule by way of comparison, state it as follows: "Where the evidence is of such a character that if it were a common-law case to justify the court in permitting the case to go to the jury and ample to sustain the verdict of the jury, and the probabilities strong that if it had been submitted to a jury the verdict would have been the same as the master's finding, the upper court will not reverse."³

§ 484. Weight given to master's report—Rule in the state courts—Continued.—The courts of other states are equally pronounced in their opinions as to the weight to be attached to the master's report. The rule as stated by the supreme court of Virginia is as follows:

"When a question of fact is referred to a commissioner, depending upon the testimony of witnesses, conflicting in their statements and differing in their recollection, the court must of necessity adopt his report, unless in a case of palpable error or mistake."⁴ The supreme court of West Virginia adopt practically the same rule. As laid down in a number of cases decided by the court of last resort in that state, it may be stated as follows:

Where matters referred to a commissioner to report upon are purely questions of fact dependent upon a large mass of contradictory, parol testimony, the findings, while not as conclusive as the verdict of a jury, are allowed great weight and

¹ Bank v. Supply Co., 150 Pa. St. 36, 24 Atl. 754.

² Stocker v. Hutter, 134 Pa. St. 19, 23, 19 Atl. 427.

³ Kirby v. Bradford Co., 134 Pa. St. 109, 111, 19 Atl. 494.

⁴ Bowers' Adm'r v. Bowers, 29 Gratt. 697; Stuart v. Hendricks, 80 Va. 601; Magarity v. Shipman, 82 Va. 784, 1 S. E. 109; Porter v. Young, 85 Va. 49, 6 S. E. 803, 806.

must be sustained unless it plainly appears that they are not warranted upon any reasonable view of the evidence.¹

The same may be said of the courts of Maine: The report of a master in chancery, upon facts submitted to him, will be presumed *prima facie* to be correct, to be true, and will not be reconsidered or set aside for an alleged mistake or abuse of authority, unless it be clearly shown, and the correction be required in equity. The burden is on the excepting party to establish the mistake or misconduct alleged.² And again, in another case, it is said that, where a question of fact is passed upon by the master, depending upon the credibility of witnesses, the error must be clearly made out to justify the court in setting aside the master's findings.³

The same may be said of New Jersey, where, in speaking of the subject, the chancellor says:

When a matter of fact is referred to a master, depending on the testimony of witnesses conflicting in their opinion, and differing in their recollection of past events, his decision ought not to be interfered with on his mere judgment of facts, unless it is a very plain case of error or mistake, he having had the witnesses before him personally, and has thus had an opportunity of judging of the weight their evidence is entitled to.⁴

§ 485. Weight given to master's report—Rule in the state courts—Continued.—In Illinois the weight to be attached to a master's report has been well settled in recent cases. The supreme court of that state, in one of the cases referred to (*Ennesser v. Hudek*, 169 Ill. 494, 48 N. E. 673), go over the whole question as to the value or weight to be given to the findings of a master, laying down the rule in language so definite and certain as to leave little or no room for doubt in this

¹ *Handy v. Scott*, 26 W. Va. 710, 718; *Boyd & Co. v. Gunnison*, 14 W. Va. 1, 19, and cases cited; *Graham v. Graham*, 21 id. 698; *McGuire v. Wright*, 18 W. Va. 507; *Fry v. Feamster*, 36 W. Va. 454, 15 S. E. 253; *Reger v. O'Neal*, 38 W. Va. 159, 10 S. E. 375.

² *Hour v. Russell*, 36 Me. 115, 127; *Da Costa v. Da Costa*, 3 P. Wms. 140, note.

³ *Miller v. Whittier*, 36 Me. 577.

⁴ *Izard v. Bodine*, 1 Stock. 309. See also *Haulenbeck v. Cronkright*, 23 N. J. Eq. 408; *Holmes v. Holmes*, 18 N. J. Eq. 141; *Clark v. Condit*, 21 N. J. Eq. 323; *Van Ness v. Van Ness*, 32 N. J. Eq. 669; *Blauvelt v. Aokerman*, 23 N. J. Eq. 495.

regard in that state in the future. The court say: "Appellants complain of the judgment of the appellate court, and attribute it mainly to a doctrine obtaining in that court that the findings of a master on questions of fact are conclusive upon the chancellor and courts of review, and cannot be disturbed by either, unless in case of clear mistake or fraud. Appellees insist that the doctrine stated is correct, and that for this reason the action of the chancellor in sustaining exceptions to the report, as against the weight of the evidence, was wrong, and the judgment of the appellate court was right. We do not agree with appellees in this contention. A master in chancery is a ministerial officer, appointed by the court to assist, by performing various services, mainly of a clerical character, in the progress of a case. . . . Under the act to regulate the practice in courts of chancery, when a cause in which the parties have no right to demand a trial by jury is at issue, the court may hear the evidence, or, under section 40, may direct an issue or issues therein to be tried by a jury, or, under section 39, may refer the cause to a master in chancery, or special commissioner, to take and report the evidence with or without his conclusions thereon. If the cause is heard by the chancellor, and the witnesses are examined before him in open court, a court of review has never hesitated for an instant to reverse its finding of fact, if clearly against the weight of the evidence, after allowing to him the advantages to be derived from observing the demeanor of witnesses. The rule was stated in *Moore v. Tierney*, 100 Ill. 207, 212, as follows: 'By the usage of appellate courts of general jurisdiction in England and America it has ever been held, in the absence of express statutes to the contrary, that the findings of inferior courts in chancery cases are open to review in the higher courts. Such courts have, from time immemorial, always proceeded in such cases to examine and determine for themselves the truth as to controverted questions of fact, and this, generally, from a consideration of the evidence found in the record.' If he directs an issue or issues of fact to be tried by a jury, he may adopt the verdict, or disregard it, and render a decree against the finding, or may grant a new trial, as he may believe justice demands, and his action is subject to review. The verdict is advisory merely. If he adopts the third course and refers the

cause to a master, or special commissioner, to take and report to the court the evidence, and also directs him to report his conclusions, the argument for appellees is that the situation is transposed, and the chancellor becomes the ministerial officer to enter the conclusion of the master. If such is the rule, and the conclusion of the master on questions of fact, from which a decree necessarily follows, is binding on the chancellor, and on courts of review, all they can ever have a right to do is to affirm his conclusions. If the finding is not subject to revision because against the clear weight of the evidence, and no exceptions can be heard except such as are founded upon mistake, fraud, misconduct or abuse of authority, the master is exalted above the chancellor and the jury, and the chancellor is bound to obey his mere assistant, no matter how erroneous the finding, or how inequitable the result. If the chancellor is bound to enter in his decree the finding of the master, of course the court of review can only approve the result and affirm the decree. This court has never announced any such doctrine, nor given to the conclusions of a master greater force or effect than those of the chancellor hearing the witnesses in open court. A rule tending to such consequences and producing a situation so ridiculous cannot be tolerated."

The court admit that in cases of accounting, "for good reasons and by established practice," the rule is somewhat exceptional, and in the further discussion of the rule, cite and comment on a number of Illinois cases, and conclude with the statement that "the master's conclusion as to facts is only *prima facie* correct, and the court, acting on its own advice, as where the rights of infants are involved, or upon exception filed, may modify or reject it if erroneous, defective or against the clear weight of the evidence. Although the court, in speaking of the weight to be given to the master's findings of fact, used the expression "only *prima facie* correct," and compared the master's findings to the verdict of a jury in a chancery case, which "verdict is advisory merely," yet it did not contend that the master's findings of fact might be set aside merely on the ground that the chancellor differed from the master as to the weight of the evidence, but limited the power to cases where the master's conclusion is "against the clear weight of the evidence," it is probable that all that the court

meant was that, where the report of the master is clearly and satisfactorily shown to be "erroneous or defective," the court may modify or reject it, thus putting the court in line with the supreme court of the United States, and the federal courts generally, as well as the decisions of most of the state courts.

§ 486. Weight given to master's report — Rule in the state courts — Continued. — The Illinois case quoted in the last section must be interpreted in the light of the contention of counsel which was being combated by the court. This contention was "that the findings of the master on questions of fact are conclusive upon the chancellor and courts of review, and cannot be disturbed by either unless in cases of clear mistake or fraud." The court held against this contention, and that, in addition to cases of "clear mistake and fraud," the court may find that the master's conclusions of fact are "against the clear weight of the evidence," in other words, that the master's findings of fact are reviewable on that ground also. When exceptions are taken upon the ground that the evidence does not support the finding, that precise question is presented to the court, and, as we have already seen, in such case it is the duty of the court to examine the whole evidence presented upon the question raised. This is precisely what such an exception is for, and we are not surprised at the holding of the court that to hold otherwise was ridiculous and could not be tolerated. The court did not say, and did not mean to be understood as holding, that the fact that the master had the advantage of seeing the witnesses while upon the stand and of hearing them testify is not an important factor in determining the weight to be attached to the master's findings, because, in other cases, this is well recognized; but, in determining this question, the courts of that state, while they hold the findings of a master not to be of equal value with those of a chancellor, made under the same circumstances, yet take the fact into consideration, if it be a fact, that he had this advantage, and give it due importance in determining the weight to be given to his report. In another recent case this is stated as follows:

"This court has never adopted the rule that a master's report is to be given the same effect as the verdict of a jury in a case where the parties have the right to have issues of fact deter-

mined by jury. In chancery cases, generally, the facts are found by the court, and the master's report, while *prima facie* correct, is of an advisory nature. If the master in fact has seen the witnesses and observed their demeanor while testifying, due weight should be given to the advantage derived therefrom in judging of credibility; but if he has only seen the witnesses to administer oaths to them, and their testimony has been taken by a stenographer out of his hearing, he has no such advantage, nor has he so far as he considers depositions taken elsewhere or other evidence not produced orally before him."¹

And again, in a still more recent case, the same court lay down the rule as follows:

"It is also argued that, as the master heard the witnesses, his findings ought to carry great weight; that he was in a better position to judge of the facts than the chancellor, and his findings should have the same weight which is accorded to the findings of a chancellor when the witnesses are heard in open court. While it is true that the master's findings are entitled to great weight when he has heard the witnesses, it has not been held that they are entitled, in an appellate tribunal, to the same consideration as that of the chancellor when he has heard the witnesses. The master's findings are only advisory to the chancellor."²

And in another case, the same court lay down the rule in still more emphatic terms, as follows:

"The report of the master was but advisory to the court, and it was fully within the power of the chancellor to decline to re-refer the cause to the master, and to hear, as chancellor, all the testimony taken before the master, consider the same, and draw conclusions as to the facts thereby established and the law applicable thereto."³

§ 487. Weight given to master's report — Rule in the state courts — Continued.— These Illinois cases holding that the master's findings are "only advisory to the court," consti-

¹ Fairbury Agricultural Board v. Holly, 169 Ill. 9, 48 N. E. 149; Ennesser v. Hudek, 169 Ill. 494, 48 N. E. 149.

² Brueggestratt v. Ludwig, 184 Ill. 673.
³ Henderson v. Harness, 184 Ill. 520, 527, 58 N. E. 786.

tute no departure from the general rule. By the use of the words "only advisory," the court simply mean that the master's findings are not conclusive upon the court, but, on the contrary, his conclusions of both law and fact may be reviewed by the chancellor, or, as said in a federal case, "The conclusions of the master do not bind the court on any question of law or fact."¹ The court does not hold, and does not mean to be understood as holding, that the chancellor can treat the master's findings as advisory only in the sense that the chancellor may arbitrarily or capriciously set aside the master's conclusions, but what is meant is this: upon exceptions taken to a master's finding of fact the duty is devolved upon the court of examining the whole evidence bearing upon the question, and if, after taking into consideration the fact, if it be a fact, that the master had the advantage of seeing the witnesses upon the stand and of hearing them testify, the chancellor is satisfied that the master has committed an error or mistake, or has found against the weight of the evidence, he may set the master's conclusions aside, and make his own findings from the evidence, or re-refer the cause with further directions.²

From what has been said it follows that mere difference of opinion as to the weight of the evidence is not sufficient ground to justify the chancellor in setting aside the master's

¹ In re Thomas, 35 Fed. 337, 339.

² As to the meaning of the words "advisory only," as used by the courts, see, in addition to the Illinois cases quoted in the text, the following: Bridges v. Sheldon, 18 Blatchf. 295, 7 Fed. 17, 37; Medler v. Albuquerque Hotel Co., 6 N. Mex. 331, 28 Pac. 551, 554; Holmes v. Holmes, 18 N. J. Eq. 141; Kimberly v. Arms, 129 U. S. 512, 522, 9 Sup. Ct. R. 355; In re Murray, 13 Fed. 550; Sinnickson v. Bruere, 9 N. J. Eq. 659; Izard v. Bodine, 9 N. J. Eq. 309; McDaniels v. Harbour, 43 Vt. 460; Howard v. Scott, 50 Vt. 48; Tilghman v. Proctor, 125 U. S. 136, 149, 8 Sup. Ct. R. 894; Callaghan v. Myers, 128 U. S. 617, 666, 9 Sup. Ct. R. 177; Camden v. Stuart,

144 U. S. 104, 12 Sup. Ct. R. 583; Medsker v. Bonebrake, 108 U. S. 66, 2 Sup. Ct. R. 351; Huntington v. Moore, 1 N. M. 489, 503; Newcomb v. White, 5 N. Mex. 435, 28 Pac. 671; Richards v. Todd, 127 Mass. 167, 172; Calvert v. Nickles, 26 S. C. 304, 2 S. E. 116, and other cases cited in support of the last few sections. For other Illinois cases defining the weight to be given to the report of a master, see Ayres v. Ayres, 142 Ill. 374, 30 N. E. 672; Whitcomb v. Duell, 54 Ill. App. 650; Bartholomae & Roessing B. & M. Co. v. Shroeder, 67 Ill. App. 560; Herrick v. Lynch, 49 Ill. App. 657, 150 Ill. 283; Green v. Hedenberg, 55 Ill. App. 425; Foster v. Swaback, 58 Ill. App. 581, 583.

findings of fact, in a case where the evidence is conflicting and where the master had the advantage of seeing the witnesses upon the stand and hearing them testify. The chancellor will not interfere with the finding of the master, on a contested question of fact, simply on the ground that his conclusion differs from that of the master. This is the rule strictly enforced in motions to set aside the verdicts of juries, and a stronger reason exists for its enforcement where the court is asked to reverse the action of the master, because, in a jury trial, the court sees the witnesses upon the stand and has the same opportunity to judge of their credibility as the jurors, while, in passing upon the master's finding, the court acts under great disadvantage, being required to judge of the evidence solely as it appears upon paper before him. There is a distinction, which must be kept in mind, between supplying material facts shown by the evidence, but not stated in the report, the setting aside the finding of facts not shown by any evidence, and the reversal of the finding of a disputed question of fact, made by the master upon conflicting testimony. In the case first stated the action of the court is purely revisory, while, in the latter case, if the court interfered it would be to treat the question as before it on appeal from the master.¹

After having one fair hearing upon a contested question of fact a dissatisfied party is not permitted to wander about in search of some other tribunal which may possibly decide in his favor. This rule is well stated by Mr. Justice Wheeler, as follows:

"The power of the court to set aside a master's report is unquestioned, but it is not to be exercised capriciously, or otherwise than for good cause; and mere differences of opinion as to the weight of evidence, when they exist, do not constitute good causes. Perhaps other masters or the court, if charged with the duty of finding the fact, would find it differently, but that does not furnish sufficient ground for setting aside the report and essaying such a trial to see what the result would be. That would be a mere appeal from the master to the court, or another master, which is clearly not allowable. There is no warrant in authority or practice for such a course in this

¹ *Bridges v. Sheldon*, 18 Blatchf. 295, 7 Fed. 17.

case. The question was brought properly before the master; he has decided it upon such grounds that the court cannot, without the exercise of unusual or extraordinary powers, disturb his decision. The responsibility of it was, by consent of the parties, cast upon him and must rest with him, and they must abide the result."¹

As is justly said by Lord Chelmsford, "different minds will, of course, draw different conclusions from the same facts; and there is no rule or standard which can be referred to by which the correctness of the decision either way can be tested."² If the chancellor reverses the master on a purely question of fact he is just as likely to be wrong in his conclusion as the master was in deciding the other way; hence there is but one safe principle to fall back on, and one which should be firmly adhered to: any tribunal called upon to reverse another upon a pure question of fact should require the party objecting to show irresistibly that the conclusion objected to was not only wrong, but entirely erroneous.³ To justify the court in setting the findings of the master aside the court must be satisfied that such findings are erroneous. A doubt as to their correctness is insufficient. Where the sole question in controversy is one of fact the supreme court will not overrule the master and the court below on mere doubt or hesitation as to the rectitude of the decree.⁴ Conclusions, however, of either law or fact are of no consequence and have no weight if not sustained by facts found and upon which they are based;⁵ therefore, where testimony before a master is vague, indefinite and uncertain, his report for that reason may be set aside by the trial court, and such action on the part of the trial court will be sustained on appeal.⁶

§ 488. Weight given to master's report — Whether same as to jury verdict.— Many courts have attempted to measure the degree of weight to be given to the findings of the master by comparison with that given to the verdict of a jury in the common-law courts. The rule in Alabama is that,

¹ *Bridges v. Sheldon*, 18 Blatchf. 507, 510, 7 Fed. 17.

² *Gray v. Turnbull*, 2 So. App. 58.

³ *Id.*

⁴ *Borough v. Saint*, 6 Cent. R. 142, 147.

⁵ *Kingsbury v. Kingsbury*, 20 Mich. 212, 214.

⁶ *Green v. Hedenberg*, 55 Ill. App. 425.

where the conclusions of the master are drawn not only from depositions, but from the oral examination of witnesses, the weight and effect ought to be accorded to his findings, which are properly given to the verdict of the jury, and, if from the whole evidence it be a matter of reasonable doubt whether the findings were correct; if there be evidence supporting them, and from the evidence, different persons, equally impartial and intelligent, might entertain different opinions, the findings ought not to be disturbed."¹ Every reasonable presumption is in favor of his findings, and this will not be interfered with, unless plainly wrong.²

If the conflict of the testimony is such that "no two minds would ever draw the same conclusion from it," the findings of the master will not be disturbed,³ or, if it be a matter of fair doubt, upon which different persons, equally impartial and intelligent, might entertain different opinions, the court will not substitute its own judgment for that of a master, any more than it would substitute its own judgment in place of the verdict of a jury.⁴ This case is quoted approvingly by the Alabama supreme court.⁵ When the master has witnesses before him he has better means of determining their credibility than a reviewing court. His finding, therefore, comes before the revising court with strong presumption of its verity, and the court will not reverse it, unless the preponderance of evidence against its correctness is so strong, that a judge at *nisi prius* would feel authorized to set aside a verdict rendered on similar testimony.⁶

This rule is rigidly applied in Tennessee. In a recent case,⁷ the supreme court of that state lay it down as follows:

"No rule of practice is better settled or merits more universal application than that the concurrent findings of the master and chancellor upon questions of fact have the same weight in this court as the verdict of a jury in civil cases. *Turley v.*

¹ *Vaughan v. Smith*, 69 Ala. 92, 95.

⁵ *Mahone v. Williams*, 89 Ala. 202,

² *Kinsey v. Kinsey*, 87 Ala. 893, 221. 397.

³ *Mahone v. Williams*, 89 Ala. 202, 231.

⁴ *Donnell v. Columbian Ins. Co.*, 2 Sumn. 366, 371.

⁶ *Lehman v. Levy*, 69 Ala. 48, 50; *Munden v. Bailey*, 70 Ala. 63, 68; *Winter v. Banks*, 72 Ala. 409, 410;

Mahone v. Williams, 89 Ala. 202.

⁷ *Railroad v. Knoxville*, 98 Tenn. 1, 9, 87 S. W. 883.

Cooley, 3 L. R. 193; Brown v. Dailey, 85 Tenn. 218, 1 S. W. 884; Turley v. Turley, id. 251, 1 S. W. 891; Fitzsimmons v. Johnson, 90 Tenn. 418, 17 S. W. 100; Dollman v. Collier, 92 Tenn. 660, 22 S. W. 741. The same rule is applicable, and should be enforced, in the court of chancery appeals. Wilson v. Bogle, 95 Tenn. 290, 32 S. W. 386, 49 Am. St. 929. The weight of the verdict of a jury in civil cases is such that it will not be disturbed in this court if there is any evidence to sustain it. Railway v. Mahoney, 89 Tenn. 312, 15 S. W. 652; Sparta v. Lewis, 91 Tenn. 370, 23 S. W. 182; Scruggs v. Heinskell, 95 Tenn. 455, 32 S. W. 386; Kirkpatrick v. Jenkins, 96 Tenn. 85; s. c., 33 S. W. Rep. 819; Citizens' Rapid Transit Co. v. Seigrist, 96 Tenn. 114, 33 S. W. 921; Mobile, etc. Co. v. House, 96 Tenn. 552, 35 S. W. R. 562. Therefore the concurrence of the master and the chancellor will not be disturbed in this court or in the court of chancery appeals, if there is any evidence to sustain it."

§ 489. Weight given to master's report—Whether same as to jury verdict—Continued.—Other courts are equally emphatic in their indorsement of this rule. In speaking of it, the supreme court of Massachusetts say:

It is well settled and important to be borne in mind in passing upon the exceptions to a master's report that the report of a master upon questions of fact referred to him, depending upon a conflict of testimony, has every reasonable presumption in its favor, and is entitled to as much weight as the verdict of a jury; and his conclusions are not to be set aside or modified without clear proof of error or mistake on his part.¹

In another case the same court state the rule as follows: The report of the master upon questions of fact referred to him has substantially the weight of a verdict of a jury, and his findings are not to be set aside or modified without clear proof of error on his part.²

¹ Dean v. Emerson, 102 Mass. 480, 482, citing Adams v. Brown, 7 Cush. 220; Mason v. Crosby, 8 Woodb. & Min. 258, Fed. Cas. 9,236; Izard v. Bodine, 1 Stockt. 309; Sinnickson v. Bruere, id. 659. 146. For other Massachusetts cases see Paddock v. Commercial Ins. Co., 104 Mass. 521, 523; Drew v. Beard, 107 Mass. 64; McDonough v. O'Neil, 113 Mass. 92; Jones v. Keen, 115 Mass. 170; Nichols v. Ela, 124 Mass. 333;

² Richards v. Todd, 127 Mass. 167, 172; Trow v. Berry, 113 Mass. 189, Morse v. Hill, 186 Mass. 60; Newell v. West, 149 Mass. 520, 21 N. E. 954.

This is the rule which obtains in Vermont. The supreme court of that state lay it down as follows:

The finding of a master in regard to facts established by the testimony is as conclusive upon the parties as the verdict of a jury. Where there is evidence tending to establish the facts found, neither the court of chancery, nor the supreme court on appeal, will review the findings in regard to the weight to be given to the testimony. The party attacking the master's report, in this particular, must satisfy the court that the master has acted corruptly, or has been led astray by having entertained a mistaken view of the law applicable to the testimony.¹

§ 490. Weight given to master's report — Whether same as to jury verdict — Continued.— This method of estimating the weight to be given to the master's findings of fact by comparing it to that given to the verdict of a jury is one that has been frequently applied by the courts. In at least one case the supreme court of the United States adopted this rule in measuring the weight to be given to the findings of fact made by a master. In speaking of a reference by the court to a master to report, not the evidence merely, but the facts of the case and his conclusions of law thereon, Justice Brown says:² "We think his finding, so far as it involves questions of fact, is attended by a presumption of correctness similar to that in case of a finding by a referee, the special verdict of a jury, the findings of the circuit court in a case tried by the court under Revised Statutes, § 649, or in an admiralty case appealed to this court. It is not absolutely conclusive, but so far as it depends on conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable."³

In other cases in the federal courts the same doctrine is announced. In one case it is said that where the evidence is conflicting and the master has passed on an issue ordinarily triable by a jury, his findings of fact will not be set aside, unless the

¹ Howard v. Scott, 50 Vt. 48, 52; How. 254; Graham v. Bayne, 18 How. Merriam v. Barter, 14 Vt. 501, 514; 60, 62; Norris v. Jackson, 9 Wall. 125; Mott v. Harrington, 15 Vt. 185. Insurance Co. v. Folsom, 18 Wall.

² Davis v. Schwartz, 155 U. S. 631, 237, 249; The Abbotsford, 98 U. S. 636. 440. See also United States Trust

³ The court cite Wiscart v. Dauchy, 8 Dall. 321; Bond v. Brown, 12 App. 330, 354, 355, 88 Fed. 140. Co. v. Mercantile Trust Co., 59 U. S.

testimony is of such a character as to produce a firm conviction that the finding is erroneous,¹ and in another that such a report should stand as the verdict of a jury.²

The same degree of weight is attached to findings of fact made by a referee; in other words, such findings have the force and effect of a special verdict,³ but the rule applies only to conclusions of fact and not to his conclusions of law, which, if erroneous, may be set aside by either the trial or appellate court.⁴ Such finding of fact will not be disturbed unless palpably erroneous⁵ or clearly against the weight of the evidence.⁶

The rule is concisely stated by the supreme court of Wisconsin as follows:

"It is an elementary rule that the verdict of a jury will not be disturbed unless against a clear preponderance of the evidence. In these respects the findings of a referee stand precisely like the verdict of a jury. 'The findings of a referee will not be disturbed when the evidence is conflicting, or when there is any evidence tending to support them.'"⁷

§ 491. Weight given to master's report — Whether same as to jury verdict — Continued.— In some jurisdictions, however, this doctrine has been expressly repudiated by the courts.⁸ The chancellor of New Jersey, in refusing to accept this

¹ Central Trust Co. v. Texas & St. L. Ry. Co., 82 Fed. 448.

² Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 81 Fed. 246.

³ Vogt v. Butler, 105 Mo. 479, 485, 16 S. W. 512; Wiggins Ferry Co. v. Railroad Co., 73 Mo. 389, 419, 39 Am. R. 519; Lingenfelder v. Wainwright, 103 Mo. 578, 589, 15 S. W. 844; Reynolds v. Robinson, 82 N. Y. 103, 106, 37 Am. R. 555.

⁴ Lingenfelder v. Wainwright, 103 Mo. 578, 589, 15 S. W. 844; Gamble v. Gibson, 83 Mo. 290.

⁵ Morse v. Hill, 136 Mass. 60.

⁶ Briggs v. Hiles, 87 Wis. 438, 447, 58 N. W. 952, citing Noonan v. Hood, 49 Cal. 493; Whicher v. The Ewing, 21 Iowa, 240; Gimbel v. Pignero, 62 Mo. 240; Lyons v. Harris, 73 Iowa,

292; Fitch v. Archibald, 29 N. J. Law, 160; McCarthy v. Teale, 51 Hun, 638; Roth v. Colvin, 82 Vt. 125; Thayer v. Central Vt. R. Co., 60 Vt. 214, 18 Atl. 859; Watson v. Campbell, 28 Barb. 421.

⁷ Briggs v. Hiles, 87 Wis. 438, 447, citing Southbridge Sav. Bank v. Mason, 147 Mass. 500, 18 N. E. 406; Marshall v. Bumby, 25 Fla. 619; Mayer v. Hazard, 49 Hun, 222; Snyder v. O'Connor, 50 Hun, 604; Perry v. Hardison, 99 N. C. 21, 5 S. E. 230.

⁸ Ennesser v. Hudek, 169 Ill. 494, 48 N. E. 673; Fairbury Agricultural Board v. Holly, 169 Ill. 10, 48 N. E. 149; Gould v. Wenstrand, 90 Ill. 127; Handy v. Scott, 26 W. Va. 710, 718; Hulings v. Hulings Lumber Co., 38 W. Va. 351, 370, 18 S. E. 620.

doctrine, says: Where exceptions challenge the correctness of the master's findings of fact it is necessary for the court to review and weigh the evidence. "For this reason the master's report is entitled to no special consideration beyond the soundness of his reasoning, and the advantage of seeing the demeanor of the witnesses while examined, which is of importance in judging of their credibility, when they contradict each other. But the report has not the position of a verdict, on a motion for a new trial in courts of law."¹

While other courts have not expressly repudiated this rule, yet, in effect, they have repudiated it in practice. For example, in Georgia, where, upon exceptions to the master's findings, if the issues are tried by a jury, it was held that, while the report is *prima facie* correct as to the facts found and is to stand till overcome by evidence satisfactory to the jury, it was held to be error to instruct the jury that, in order to overcome the presumption in favor of the report, the evidence produced by the exceptant must be "so clear, strong, unambiguous and unequivocal as to leave in the minds of the jury no reasonable doubt."² All that is required is "that there should be a sufficient preponderance of evidence to satisfy the jury that there was error in the conclusion reached."³ The evidence reported by the master as well as *aliunde* testimony is submitted to the jury.⁴

In the last two sections it is shown that quite a number of the courts of this country have taken the stand that a master's findings of fact, where the evidence is conflicting and he had the advantage of seeing the witnesses upon the stand and of hearing them testify, is as binding upon the chancellor as the verdict of a jury is upon the trial judge in a common-law court, and we must admit that the balance of reasoning is in their favor. Every reason that is urged in support of a verdict, or the finding of facts by a judge, where the witnesses are produced and testify in the presence of the judge and jury, exist in support of the findings of a master. These reasons have

¹ Holmes v. Holmes, 18 N. J. Eq. 141.

² Poullain v. Poullain, 76 Ga. 420, 439.

³ Id. 441.

⁴ Id. See also Keaton v. Mayo, 71 Ga. 649, 651. In Georgia, on exceptions to the auditor's findings, the issues may be submitted to a jury. See *ante*, § 478.

been stated hundreds of times by the courts of this country, but, perhaps, never more satisfactorily or clearly than in *Ayers v. Ayers*, 142 Ill. 374, 375, where the court say: "The witnesses were all examined orally, and before the chancellor, and who, therefore, had facilities for judging of the comparative credibility of these witnesses, which are denied to us. It is within the experience of all having familiarity with the examination of unscrupulous witnesses, that sometimes the countenance, tone of voice and manner of the witness, while testifying, will contradict and deny the truth of the words that come from his lips, and the law does not require that the chancellor should believe the testimony of one thus self-impeached. But no bill of exceptions or certificate of evidence attempts to, or can, reproduce fully and accurately the countenance, tone of voice or manner of the witnesses while testifying, and so it results that the appellate tribunal, having nothing but the written or printed transcript of the words, to which the witnesses have testified, but which will not, where there is evidence which, considered by itself alone, is sufficient to sustain the decree, reverse merely because it may appear from the face of record that the preponderance of the evidence does not support the decree, the witnesses having been examined orally before the chancellor on the hearing."

These remarks apply with equal force to any reviewing tribunal, as well to a chancellor reviewing the findings of a master as to an appellate tribunal reviewing findings of facts made by the chancellor. Indeed, if there is any difference between the two, the master's findings should be more binding upon the chancellor than the verdict of a jury is upon the trial court, for the reason that the trial judge saw the witnesses upon the stand and thus had an equal opportunity with the jury of judging of their credibility, while the chancellor had no such opportunity of judging of the credibility of the witnesses who appeared in the master's office, but occupied the precise position of a court of review when passing upon the findings of a chancellor in a case where the latter had the witnesses before him.

§ 492. Weight given to master's report — Continued —
Matters increasing its weight.— It must be kept in mind that the same degree of weight is not given to the master's

findings in every case, but varies owing to the nature of the matter submitted and to the circumstances and surroundings. Matters enhancing the weight of a master's findings may be stated as follows:

First. The matter submitted may be one peculiarly appropriate for the master to pass upon.

In cases where courts of law are slow to set aside findings of the jury courts of chancery will likewise be reluctant to set aside or modify the findings of the master. Mr. Justice Newman, in a case in the United States court for the northern district of Georgia, speaking for the court says: "The question of contributory negligence is one, above all others, which courts leave to the determination of jurors, when a case is for jury trial, or to the master, when the case is one for the determination of that officer. The finding of the jury or master in such a case will not be disturbed, unless it is manifestly erroneous."¹ So, too, in allowing or disallowing items in stating an account by a master the rule is well settled that all such questions are peculiarly fitted for the consideration of a master, and every reasonable presumption is to be made in favor of his decision; and unless it clearly appears from the report or otherwise that he has acted under mistake, his report will be sustained.² The following is given as another illustration: Upon a bill by mortgagor to redeem the question whether any particular expenditure was for an improvement merely ornamental, or whether it was necessary to the upholding of the estate, is one peculiarly fit for the consideration of the master, and every reasonable presumption ought to be made in favor of his decision. Unless it clearly appears from the report itself, or from other evidence, that the master was under a mistake in this respect, his report will be sustained.³

Second. The report itself may show that the master has used great care and diligence in its preparation and in the investigation of the matters submitted; or the master may be well known to the court as "able, faithful, and diligent," and peculiarly well qualified to pass upon the questions at issue.

¹ Clyde v. Richmond & D. R. Co., 69 Fed. 673, 678.

² Reed v. Reed, 10 Pick. 398, 400; Sparhawk v. Wills, 5 Gray, 423, 426.

³ Adams v. Brown, 7 Cush. 220, 222. and cases cited.

If, upon a careful examination of a master's report, it is found to bear intrinsic evidence of laborious and critical examination of facts; and there is no reason to doubt the accuracy of his conclusions in regard to complicated transactions, or the purity of his motives, exceptions should be overruled.¹ Or again, where the master is known by the chancellor to be able, faithful and diligent, and it is clear that he is without bias and partiality, how can the court, whether in a reference strictly by consent or merely acquiesced in, undertake to interfere with the amount found due by him, in the absence of any evidence of bias or clear mistake.²

§ 493. Weight given to master's report—Matters increasing its weight—Continued.—*Third.* Greater weight is given to the master's findings where the reference is by consent than where it is compulsory. Under the written consent of parties to refer all questions of law and fact to the determination of a special master, the finding of that officer is usually conclusive. Such a consent, entered as an order of court, is a submission of the controversy to a special tribunal selected by the parties, to be governed by the ordinary rules applicable to the administration of justice in tribunals established by law; and its determinations are not subject to be set aside and disregarded at the mere discretion of the court. Such findings may be avoided, however, on exceptions showing that the report is unsupported, or essentially defective, but not otherwise.³ So far as the findings of fact by a special master, appointed by consent of parties, are based on conflicting evidence, or upon the veracity of witnesses, or so far as there is any evidence consistent with the finding, they are conclusive and binding upon the court.⁴ When the entire case is referred to the master, by consent or without objection, to take the proofs and report his conclusions thereon, his findings of fact have the same presumption in their favor as the verdict of a special jury, only to be reviewed under the reservation contained in the consent and order of the court, where there

¹ Thompson v. Smith, 2 Bond, 320, 23 Fed. Cas. 1092.

² Walters v. Western & A. R. Co., 69 Fed. 706, 711.

³ Farrar v. Bernheim, 21 C. C. A. 264, 75 Fed. 136, 139.

⁴ United States Trust Co. v. Mercantile Trust Co., 59 U. S. App. 330, 855, 88 Fed. 140.

has been manifest error in the consideration given to the evidence or in the application of the law.¹

In *Kimberly v. Arms*, 129 U. S. 512,² a distinction was drawn between the findings of a master under the usual order to take and report testimony, and his findings when the case is referred to him by consent of parties. It was there held that while the court could not, of its own motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers, yet where the parties select and agree upon a special tribunal for the settlement of their controversy, there is no reason why the decision of such tribunal with respect to the facts should be treated as of less weight than that of the court itself.³ All that the court meant to say in the case of *Kimberly v. Arms*⁴ was that, where a reference is made to a master, by consent of parties, with directions to take the testimony and report his conclusions of both law and fact, his findings are entitled to greater weight than in a case where the reference is made against the objection of the party who questions the correctness of the master's report.⁵ This is the only rational view that can be taken of what the court said in that case.

§ 494. Weight given to master's report — Matters increasing its weight — Continued. — Relative to consent references and the increased weight given thereby to the findings of the master, I will add that the last case I find on the subject in the supreme court reports is that of *Davis v. Schwartz*, 155 U. S. 651. Mr. Justice Brown, speaking for the court, says:

"As the case was referred by the court to a master to re-

¹ *Field & Co. v. Romero*, 7 N. Mex. 630, 640, 41 Pac. 517, citing *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. R. 855; *Davis v. Schwartz*, 155 U. S. 631, 15 Sup. Ct. R. 237.

² 9 Sup. Ct. R. 855.

³ See to the same effect, *Crawford v. Neal*, 144 U. S. 585, 596, 12 Sup. Ct. R. 759; *Furrer v. Ferris*, 145 U. S. 132, 12 Sup. Ct. R. 82; *Davis v. Schwartz*, 155 U. S. 631, 637, 15 Sup. Ct. R. 237;

Bosworth v. Hook, 46 U. S. App. 598, 77 Fed. 686; *Farrar v. Bernheim*, 41 U. S. App. 172, 75 Fed. 136; *Chandler v. Pomeroy*, 87 Fed. 262, 268; *United States Trust Co. v. Mercantile Trust Co.*, 59 U. S. App. 330, 354, 355, 88 Fed. 140.

⁴ 129 U. S. 512, 9 Sup. Ct. R. 355.

⁵ *Home Land & Cattle Co. v. M'Namara*, 111 Fed. 822, 827.

port, not the evidence merely, but the facts of the case, and his conclusions of law thereon, we think that his finding, so far as it involved questions of fact, is attended by a presumption of correctness similar to that in the case of a finding by a referee, the special verdict of a jury, the findings of a circuit court in a case tried by the court under Rev. St. 649, or in an admiralty cause appealed to this court. In neither of these is the finding absolutely conclusive, as if there be no testimony tending to support it; but so far as it depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable. *Wiscart v. D'Auchy*, 3 Dall. 321; *Bond v. Brown*, 12 How. 254; *Graham v. Bayne*, 18 How. 60, 62; *Norris v. Jackson*, 9 Wall. 125; *Insurance Co. v. Folsom*, 18 Wall. 237, 249; *The Abbottsford*, 98 U. S. 440.

"The question of the conclusiveness of findings by a master in chancery under a similar order was directly passed upon in *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, in which a distinction is drawn between the findings of a master under the usual order to take and report testimony, and his findings when the case is referred to him by consent of parties, as in this case. While it was held that the court could not, of its motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers, yet, where the parties select and agree upon a special tribunal for the settlement of the controversy, there is no reason why the decision of such tribunal, with respect to the facts, should be treated as of less weight than that of the court itself, where the parties expressly waive a jury, or the law declares that the appellate court shall act upon the finding of a subordinate court. 'Its findings,' said the court, 'like those of an independent tribunal, are to be taken as presumptively correct, subject, indeed, to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise.' As the reference in this case was by consent to find the facts, we think the rule in *Kimberly v. Arms* applies; and, as there is nothing to show that the findings of fact were unsupported by the evidence, we

think that must be treated as conclusive. To same effect are *Crawford v. Neal*, 144 U. S. 585, 12 Sup. Ct. 759; *Furrer v. Ferris*, 145 U. S. 132, 12 Sup. Ct. 821.

"The case at bar was not referred to Mr. Pendleton by the court for the purpose of merely taking testimony and reporting that testimony to the court, but, by the terms of the order, the amount of compensation to be paid to Mr. Brown was referred to his determination. It is true that there was no written stipulation consenting to a reference to a master, but the intention clearly was and the consent was that the special master should hear evidence, investigate the matter fully, and fix the amount, subject to the supervision of the court. If the court should undertake to fix any other amount than that reported by the special master, it would result in trying the case all over again on the testimony taken by the special master. The amount found by the special master is abundantly sustained by the evidence. It is certainly true that under the evidence he might have found otherwise, but he has decided to give greater weight to the testimony which approximates and favors the amount reported. As before stated, nearly all of the witnesses who were examined before the special master had hypothetical cases put to them. Counsel on either side assumed in their questions a certain amount and character of service as rendered by Mr. Brown. The witnesses were examined and cross-examined in this way. The special master heard all these questions, observed the character of the hypothetical cases put before the witnesses, and noticed how far these hypothetical cases were supported by the real facts in the case. That the special master is able, faithful and diligent there can be no question. That he was without bias and partiality I think is equally clear. How, then, can the court, in a reference of this sort, whether strictly by consent or merely acquiesced in, undertake to interfere, in the absence of any evidence of bias or clear mistake, with the amount of the report?"¹

As to what is a "consent reference," it is said that a reference without objection is by consent, and a report therein, as to contested questions of fact, is conclusive unless the court, by an

¹Citing *Walters v. Western & A. R. Co.*, 69 Fed. 706, 708-711.

inspection of the record, can see that there is no testimony to sustain the master's finding.¹

Fourth. The report of the master may be entitled to additional weight because of the fact that the master had superior opportunities for arriving at the truth by reason of having made a personal inspection of the matter in controversy.

Where the master, for the purpose of acquiring information in addition to that shown by witnesses, makes a personal inspection of the subject of inquiry, his findings will be considered as having equal weight as a verdict of a jury.² In a case of this character, where the master made frequent examinations of the *locus in quo*, in the U. S. C. C. App., sixth circuit, the court comment on this fact and then add: "It is a settled rule in the federal courts that, in dealing with exceptions to a master's report, the conclusions of the master, depending on conflicting testimony, have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part."³

§ 495. Weight given to master's report — Matters increasing its weight — Continued.— So, too, where the evidence is conflicting and the finding rests, to some extent, on the physical or mental condition of a party before the master, such finding will not be disturbed unless there is direct evidence to convict the master of error. For example, from the evidence in a case and from the appearance of a young man, who was before the master as a witness, the master became convinced that he was intellectually of an inferior grade, and that, as to the scheme charged, he was the dupe of his uncle and father, and unconscious of their designs; the upper court reversed the decree of the court below and sustained the master.⁴ The same rule

¹ Field & Co. v. Romero, 7 N. Mex. 630, 640, 641, 41 Pac. 517; De Cordova v. Korte, 7 N. Mex. 678, 682, 41 Pac. 526.

² Citizens' Passenger Ry. Co. v. Passenger Ry., 164 Pa. St. 274, 30 Atl. 159.

³ Lake Erie & W. R. Co. v. City of Fremont (U. S. C. C. App., 6th Ct.), 92 Fed. 721, 731, citing Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894;

Crawford v. Neal, 144 U. S. 585, 13 Sup. Ct. 759; Furrer v. Ferris, 14 U. S. 132, 12 Sup. Ct. 821; Davis v. Schwartz, 155 U. S. 631, 15 Sup. Ct. 237; Third Nat. Bank v. Nat. Bank 80 C. C. A. 436, 86 Fed. 852; TL. Cayuga, 16 U. S. App. 577, 8 C. C. A. 188, 59 Fed. 488.

⁴ Bugbee's Appeal, 110 Pa. 19, 16 1 Atl. 273.

applies where the master has made a personal examination of a physical matter and his findings are based in part on such examination. Thus the question being whether a certain crossing over a railroad track was dangerous or not, the testimony being conflicting and the master having made a personal examination of the crossing, the supreme court refused to disturb his findings.¹

Fifth. Additional weight is given to the findings of a master in the upper court when they have been approved by the chancellor.

Findings upon purely questions of fact are not, ordinarily, as conclusive as the verdict of a jury, but are entitled to great weight, and should be sustained, unless plainly not warranted by any reasonable view of the evidence. This is especially true where the appellate court is asked to review findings which have been approved by the court below.²

Mr. Justice Dean, delivering the opinion of the supreme court of Pennsylvania in a recent case, says: "While we frequently draw from facts other inferences than those the master and court below think warranted, and often come to a different conclusion as to the law applicable to the facts, it is a very rare case that the findings of fact by the master, approved by the court below, are so manifestly wrong that we feel called upon to set them aside. Very often the testimony presented to us on paper-books seems not to warrant the findings; but we know full well there was probably much at the hearing to induce belief or disbelief, which does not and cannot find its way to the printer. The manner of the witness, his intelligence, acuteness of perception and opportunities for observation, all are matters which influence the master, but cannot be fully transferred to report. Besides, there is more or less of abbreviation, lack of emphasis, and error in the most accurate transcript of testimony."³

¹ *Citizens' Passenger Ry. v. East Harrisburg Passenger Ry.*, 164 Pa. St. 274, 282, 30 Atl. 159.

² *Fry v. Feamster*, 36 W. Va. 454, 465, 15 S. E. 253; *Roger v. O'Neal*, 33 W. Va. 159, 10 S. E. 375; *Handy v. Scott*, 26 W. Va. 710; *Boyd v. Gun-*

nison, 14 W. Va. 1; *Graham v. Graham*, 21 W. Va. 698.

³ *Brotherton v. Reynolds*, 164 Pa. St. 184, 189, 30 Atl. 284. As to additional weight given to the findings of the master by the approval of the trial court, see *post*, § 556 *et seq.*

§ 496. Weight given to master's report — Continued —
Exceptions to general rule.—To the general rule that a master's findings are entitled to the same weight as the verdict of a jury in a case at law, or at least is such that it requires clear and satisfactory proof of error in order to justify the chancellor in setting it aside, there are a number of exceptions. In these excepted cases the weight of the findings is reduced to a bare presumption of correctness. They may be stated as follows:

First. The rule does not apply where the report is made without hearing both sides thereon, where it is legal to hear both.¹

Second. The rule does not apply where the parties by stipulation introduce further evidence before the chancellor after the coming in of the report.

In other words, if the parties by stipulation introduce further evidence before the chancellor after the master has returned his report, it renders nugatory the rule that every presumption is in favor of the master's findings, and that they will only be set aside in case of clear error or mistake.² In such a case the chancellor must decide the case upon the evidence — that returned by the master together with the additional evidence introduced before the court,— and upon the whole evidence form his own conclusions independently of those of the master.³

Third. The rule applies only to the master's findings of fact and not to his arguments or conclusions of law. It does not include questions of law, or, generally speaking, the interpretation and construction of the legal effect of documents."⁴

It is plain that the findings of the master as to the legal effect of an instrument are no more binding on the court below than is the construction placed by the court below on the same instrument conclusive upon the upper court in case of appeal.⁵ With reference to all such matters the master's opportunity for judging is no better than that of the chancellor,

¹ Cutliff v. Boyd, 72 Ga. 302, 311.

² Id.

³ United States Trust Co. v. Mercantile Trust Co., 59 U. S. App. 330, 355, 88 Fed. 140.

⁴ Id. See also Bell v. Windsor, 79 Ga. 193, 208, 4 S. E. 100.

⁵ Id.

and when the reason of the rule ceases the rule itself has no application; or, as said in another case, when there is no disagreement between the court and the master as to the facts, the only question being as to their legal effect, there is no presumption as to the master's conclusions, the court being as competent as the master to pass upon such legal effect.¹ That is, this rule has no application to cases where the master finds the facts, but incorrectly applies the law to such facts. In such a case the master has no greater facilities than the chancellor or court of review.² When also, in order to arrive at a proper recommendation for a decree, the master states his conclusions of law, they are but opinions submitted for adoption, if the court thinks they are founded in reason and law.³ This exception includes the interpretation and construction of documents offered in evidence, in other words their legal effect.⁴

Fourth. The rule has no application where the conclusion of the master is but an inference drawn from other established or undisputed facts in the case. In such a case the inference drawn by the master is only presumptively correct.

If the master's findings are but deductions from undisputed facts, or from uncontradicted and credible evidence, the controlling reason for the application of this principle is not present, because, in such a case, he has no greater facilities for reaching a correct conclusion than the chancellor has, in passing upon the exceptions to his report.⁵ A finding of a fact is one thing; the drawing of a conclusion or inference from a fact clearly proven or undisputed is another. In the former the master's finding is entitled to great weight, but in the latter, that is, "where the questions decided grow out of inferences from clearly proved facts, or conclusions derived from reasoning, the report has not the same weight."⁶ Where the fact found by the master is merely a deduction from other facts reported

¹ Cemetery Co. v. Griffin, 35 W. N. C. 537; United States Trust Co. v. Mercantile Trust Co., 59 U. S. App. 830, 335, 88 Fed. 140.

² Field & Co. v. Romero, 7 N. Mex. 630, 647, 41 Pac. 517; De Cordova v. Korte, 7 N. Mex. 678, 693, 41 Pac. 526; McConomy v. Reed, 152 Pa. St. 42, 25 Atl. 176.

³ Phillips' Appeal, 68 Pa. St. 130, 138.

⁴ United States Trust Co. v. Mercantile Trust Co., 59 U. S. App. 830, 335, 88 Fed. 140.

⁵ McConomy v. Reed, 152 Pa. St. 42, 44, 25 Atl. 176.

⁶ Kutz's Appeal, 100 Pa. St. 75, 79; Phillips' Appeal, 68 Pa. St. 130, 138; Sproull's Appeal, 71 Pa. St. 137.

by him, his conclusion is simply a result of reasoning, of which the court is as competent to judge as the master.¹ In such a case there is simply a presumption in favor of the correctness of the conclusion of the master, and upon examination, if the court finds the master "supporting a conclusion by false deductions, or upon erroneous views of the character and weight of facts actually found, it is not only the right but the duty of the court to correct his error."²

§ 497. Weight given to master's report — Exceptions to general rule — Continued.— *Fifth.* The last exception occurs in cases where the master failed to see the witnesses upon the stand or hear them testify; that is, in cases of contested questions of fact, where the witnesses did not testify in the presence or hearing of the master, but he formed his conclusions by simply reading over the testimony.

This occurs in two classes of cases, as follows:

(a) Where the testimony of the witnesses is taken before some other officer, in the form of depositions, and is simply offered in evidence before the master.

(b) Where the witnesses are sworn and testify nominally in the presence of the master, but the testimony is, in fact, taken down by a stenographer, out of the presence and hearing of the master, and while the latter is discharging other duties.

It is obvious that his conclusions of fact in such cases are not entitled to more than a presumption in their favor, because the chancellor's opportunity of forming correct conclusions from the evidence are exactly the same as those of the master. If the master in fact has seen the witnesses and observed their demeanor while testifying, due weight should be given to the advantage derived therefrom in judging of credibility; but if he has only seen the witnesses to administer oaths to them, and their testimony has been taken by a stenographer out of his hearing, he has no such advantage; nor has he so far as he considers depositions taken elsewhere or other evidence not produced orally before him.³

Where the witnesses do not testify *viva voce* before the master, the master's opportunities are no greater than the chancel-

¹ Phillips' Appeal, 68 Pa. St. 130, 133.

² Fairbury Agricul. Board v. Holly, 169 Ill. 10, 48 N. E. 149.

³ Id.

lor's, or the appellate court, and the court will not hesitate to set aside the master's findings if the judgment of the court differs from that of the master. In such a case the judge is less trammelled by the master's findings, and will dispose of the matter upon his own judgment as to the weight of the evidence.¹ The practice of swearing the witnesses and turning them over to a stenographer to hear and take down their testimony in the absence of the master, while he is engaged in the discharge of other duties, is not to be tolerated. In order to form correct conclusions as to facts established by the testimony it is the duty of the master to see the witnesses and hear them testify.² It is a great injustice for the master to absent himself from the room while the witnesses are testifying, as the court, on hearing of exceptions to his report, will, as to all contested questions of fact, assume, unless the record shows the contrary, that he discharged his duty in this behalf, and will affirm his findings on the very ground that he "saw and heard the witnesses while testifying." In contested cases before masters, where the testimony is taken out of the actual presence and hearing of the master, counsel should insist that his minutes should show such fact. Justice to their clients and to the court demands that this should be done to prevent the improper application of a rule that gives to the report of the master greater weight than it is entitled to. The findings of a master based on depositions taken in an adjoining room, out of his presence, are entitled to no greater weight than if based on depositions taken in an adjoining state.³

In concluding this section upon exceptions to the general rule governing the weight to be given to the conclusions of the master, it may be well to call attention to the fact that they are all based upon the same underlying principle, viz.: that the master's opportunities for forming correct conclusions were no greater than those of the court, or, in other words, that, under the particular circumstances, the court, to say the least, is equally as capable as the master of forming correct conclusions, and, for this reason, will not hesitate to substitute

¹ *Fawcett v. Burwell*, 27 Gr. Ch. 445.

² See further on this subject, *ante*,

³ *Schnadt v. Davis*, 185 Ill. 476, 486, § 214.

57 N. E. 652.

its own judgment for that of the master wherever that of the latter is found to be erroneous.

§ 498. Harmless error.—The doctrine of harmless error is one running through the whole administration of justice, and one especially applied by all courts when reviewing the action of inferior tribunals. It is within the knowledge of every lawyer that very few contested cases ever find their way into the upper courts where the record is absolutely free from error. Hence the necessity, in every instance where an error is shown to exist, of determining whether it worked any injury to the complaining party, as he will never be heard to complain of error that did him no injury.¹ It is well settled that a party cannot avail himself of an error which does not operate to his prejudice, and, *a fortiori*, that he cannot take advantage of errors which operate to his advantage.² This principle is one which is constantly applied by the chancellor in reviewing the action of the master, as well as by the court in passing upon that of referees. Although a master's report may be inaccurate in some statements of fact, or may omit some, unless it appears that the defects are such as to work some material prejudice to the party excepting, whereby an unjust result is reached, a re-reference of the report will not be directed.³ The master may err in his rulings as to the admission or exclusion of evidence, and yet, if the same result is attainable after eliminating the error, the report may still be confirmed.⁴

The real question is whether the errors or mistakes of the master are material; that is: Did his erroneous holdings or views lead "to any error or mistake in the results? If not, there can be no reason for disturbing his findings upon matters that were properly submitted."⁵ If the master, under a mistaken view of his duties under the order of reference, investigates and reports upon matters not submitted to him, such erroneous action should not in the least detract from the weight to be given to his findings upon matters that were properly

¹ Willemin v. Dunn, 98 Ill. 511, 521. J.), 96, 105; McAlister v. Olmstead, 20

² Miller v. Whelan, 158 Ill. 544, 559, Tenn. (1 Humph.) 210.
42 N. E. 59.

³ McElroy v. Swope, 47 Fed. 380. 258, 276.

⁴ Jackson v. Jackson, 2 Green (N.

⁵ Mason v. Crosby, 8 Woodb. & M.

submitted, unless the court can see that such erroneous action influenced the master's conclusions upon matters that were properly submitted, and led to results different from what otherwise would have been reached. The rule here stated applies not only to cases where the master has exceeded the authority vested in him by the order of reference under the issues, but to all other errors committed by the master during the hearing or in making up his report, such as failure to give notice to a party, the exclusion or admission of evidence, and the like. For example, the error complained of in a given case was that the party had no notice "of the time of the sitting of the master, or of the filing of his report." Of this the court said: "It is sufficient to say that the reference to the master was wholly unnecessary, as he had nothing to do but to compute the sum due on the face of the papers, which the court ought to have done by itself, or by the clerk. This court will not reverse a decree for an immaterial departure from the technical rule when it can see that no harm resulted to the appellant."¹ So where the complaint is that the master improperly rejected evidence offered by the complaining party, yet if the court can see that if the evidence had been admitted, and the master had given to it all the force which could be reasonably claimed, the result must have been the same, the court should not re-refer the matter nor disturb the master's findings.² This is but the application of the general rule that a party will not be heard to complain of mere irregularities which were not prejudicial to him. A party will not be heard to complain of an error which "on its face and by legal necessity could do no injury."³ If reviewing tribunals only affirmed in cases absolutely free from error, affirmations would be the exception to the rule, as few contested cases of any length can be carried through without error intervening somewhere;

¹ *Allis v. Insurance Co.*, 97 U. S. 144.

² *Cannon v. Pratt*, 99 U. S. 619, 623; *Hornbuckle v. Stafford*, 111 U. S. 389, 394, 4 Sup. Ct. R. 515; *Sullivan v. Iron Silver Mining Co.*, 143 U. S. 431, 12 Sup. Ct. R. 555; *Merok v. American Freehold Land Mortgage Co.*, 79

Ga. 213, 233; *Bootle v. Blundell*, 19 Ves. Jr. 494, 501.

³ *Coit v. Waples*, 1 Minn. 134, 146; *People v. Wiley*, 3 Hill (N. Y.), 194, 214; *Willoughby v. Comstock*, id. 389, 392; *Hayden v. Palmer*, 2 Hill (N. Y.), 205, 209; *Mansfield v. Wheeler*, 23 Wend. 79; *Greenleaf v. Birth*, 5 Peters (U. S.), 132, 135.

hence the necessity of the rule, equally applicable to cases heard by the master as by the court, that a harmless error is never a ground for reversal.

The master's ruling may have been erroneous and yet the error be of such character that the chancellor will not reverse his findings, for it is a rule of universal application that an appellate tribunal will never reverse a lower on the ground of error where it is clear that the error complained of "did not prejudice the rights of the party against whom the ruling was made."¹ Courts only reverse on account of errors prejudicial to the complaining party; hence in a case where it is clear that the findings of the master are the only ones which could properly have been made on the conceded facts, they should not be disturbed, for certainly, in such a case, no error, or number of errors, can with any propriety be said to be prejudicial.² It has even been held that when this rule of harmless error is invoked "it must appear beyond a reasonable doubt that the error complained of did not and could not have prejudiced the right of the party duly objecting."³

§ 499. Harmless error — Continued.—The report of the master may not be full enough in some matters and unnecessarily full in others, and also contain some inaccuracies of statement and errors of fact; "but unless it can be made to appear that these defects have wrought some material prejudice to one of the parties, such as a conclusion drawn from misstated facts, or a conclusion of law predicated thereon, or there be some important fact not found which should have been reported, whereby a different result should be reached, it is not perceivable why there should be a re-reference or vacation of the report."⁴ Hence a report may be confirmed not-

¹ United States v. Shapleigh, 12 U. S. App. 26, 45, 54 Fed. 126; Lancaster v. Collins, 115 U. S. 222, 227, 6 Sup. Ct. R. 33; Deery v. Cray, 5 Wall. 795, 807; Gregg v. Moss, 14 Wall. 564, 569; Lucas v. Brooks, 18 Wall. 436, 454; Allis v. Insurance Co., 97 U. S. 144, 145; Cannon v. Pratt, 99 U. S. 619, 623; Mining Co. v. Taylor, 100 U. S. 37, 42; Hornbuckle v. Stafford, 111 U. S. 389, 394, 4 Sup. Ct. R. 515.

² Heckle v. Grewe, 125 Ill. 58, 63,

17 N. E. 437, 8 Am. St. 332; Avery v. Moore, 133 Ill. 74, 81, 24 N. E. 606; Pennsylvania Coal Co. v. Kelly, 156 Ill. 9, 14, 15, 40 N. E. 938.

³ Boston, etc. R. Co. v. O'Reilly, 158 U. S. 334, 15 Sup. Ct. R. 830; Gilmer v. Higley, 110 U. S. 47, 3 Sup. Ct. R. 471; Deery v. Cray, 72 U. S. (5 Wall.) 795, 807, 808; New York, etc. R. Co. v. O'Leary, 93 Fed. 737, 741.

⁴ McElroy v. Swope, 47 Fed. 390.

withstanding errors in it, provided it is apparent that the errors did not affect the conclusions.¹ In chancery cases the practice is not to reverse for erroneous rulings in the admission or exclusion of evidence, unless it is seen, after an inspection of the entire record, that a different ruling might have induced a different decree.² In such cases it is not error to permit incompetent evidence to be heard before the judge without a jury, subject to objection; and even if no ruling against it is made, the court will be presumed to have acted upon the competent testimony in the record.³ This rule in chancery proceedings is wholly different from that in trials at law as to the effect of the admission of incompetent evidence. The chancellor being the judge of both the law and the evidence, the presumption is that, in rendering his decree, he will only regard that which is legal and pertinent; but in jury trials it is different, as in these the court must first pass upon the admissibility of the evidence, and, when admitted, the presumption is that the jury acted upon and considered all of the evidence before them as legitimate. It is the correct practice for the chancellor, after the evidence is heard, to regard no portion of it which is immaterial or illegal, and to decide the case alone on the legal evidence adduced.⁴ While it is true that the court at law will not disturb a judgment for an immaterial error, yet it should appear beyond a doubt that the error complained of did not and could not have prejudiced the rights of the party duly objecting;⁵ but it must be presumed in a chancery case that the chancellor, upon the final hearing, rejected all incompetent evidence. In actions at law the admission of incompetent evidence, against objection, is subject to review, but in chancery a different rule prevails. The question there is whether or not the competent evidence, taken in connection with the pleadings, sustains the decree.⁶

¹ *Gottfried v. Crescent Brewing Co.*, 22 Fed. 488.

² *Burt v. Burt*, 40 Ill. App. 586; *Willemin v. Dunn*, 98 Ill. 511, 520.

³ *Gordon v. Reynolds*, 114 Ill. 118, 28 N. E. 455; *Peabody v. Kendall*, 145 Ill. 519, 82 N. E. 674; *Coffey v. Coffey*, 179 Ill. 288, 391, 392, 53 N. E. 590.

⁴ *Swift v. Castle*, 23 Ill. 132, 137.

⁵ *Boston, etc. R. Co. v. O'Reilly*, 158 U. S. 834, 15 Sup. Ct. R. 880; *Deery v. Cray*, 72 U. S. (5 Wall.) 795, 807, 808; *Gilmer v. Higley*, 110 U. S. 47, 50, 3 Sup. Ct. R. 471; *Peabody v. Kendall*, 145 Ill. 519, 526, 82 N. E. 674.

⁶ *Sawyer v. Campbell*, 180 Ill. 186, 204, 22 N. E. 458.

In a chancery cause, although the evidence, as returned by the master with his report, may contain much that is irrelevant, yet the chancellor as well as the upper court on appeal will presume, in the absence of anything to the contrary, that the master and the court below acted only upon such evidence as was properly admissible under the issues.¹ For this reason the admission of incompetent evidence on the hearing before the master is not cause for reversal, provided there is sufficient competent evidence in the record to sustain the decree, the reason being that he is supposed to have disregarded all evidence in the case except that which is competent and relevant to the issue.² The fact that a master admitted improper evidence on the hearing of the cause is no ground for rejecting the whole report;³ but where the findings of the master are based on illegal testimony the court will set them aside.⁴

The exclusion of competent evidence is a harmless error where the result must have been the same had it been admitted.⁵ Therefore an exception based on the ground that a master erred in ruling out competent evidence will be overruled when the testimony so ruled out "could not have the slightest effect on the result of the case,"⁶ and a master's report will not be corrected because immaterial evidence was admitted by him.⁷ If after the rejection of the improper evidence the master should have still found as he did, the chancellor should not disturb his findings, as, in such a case, the error is a harmless one, for the error does not change the result.⁸ Errors in the rulings of the master which if corrected would not or ought not to change the result do not justify a re-reference, but come under the head of "harmless error."⁹ The rule in regard to the ad-

¹ Allison v. Perry, 130 Ill. 9, 22 N. E. 492; Burt v. Burt, 40 Ill. App. 586; 362, 27 N. E. 563; Bremmerman v. Jennings, 101 Ind. 253, 255.

Hillyer v. Lewis, 81 Ill. 264; Smith v. Long, 106 Ill. 485; Hughes v. 4 De Cordova v. Korta, 7 N. Mex. 678, 688, 41 Pac. 526.

Frisby, 81 Ill. 188, 190; Magnusson v. 5 Hanlon v. Doherty, 109 Ind. 87, 45, 9 N. E. 782.
Charlson, 32 Ill. App. 580, 585; Hurt v. Nave, 49 Ala. 459, 463.

² Mix v. The People, 116 Ill. 265, 274, 4 N. E. 783; Bradford v. Clower, 60 Ill. App. 55. 6 Taylor v. Kilgore, 33 Ala. 214, 222.

³ Lewis v. Godman, 129 Ind. 859,

⁷ Garretson v. Clark, 15 Blatch. 70, Fed. Cas. 5,248.

⁸ Insurance Co. v. Foote, 79 Ill. 361.

⁹ Mason v. Crosby, 3 Woodh. & Min. 258, Fed. Cas. No. 9,287.

mission of improper evidence in a chancery hearing is as follows: If there is sufficient evidence of unquestioned competency to sustain the finding, then the fact that incompetent evidence was admitted forms no ground for disturbing such finding. The whole proceeding in a chancery case, both before and after the coming in of the master's report, is governed by the principles which apply to trials before the court without a jury and not by the technical rules applicable to jury trials.¹ Hence, although the evidence as returned by the master may show that much of it is irrelevant, yet it will be presumed, in the absence of anything to the contrary, that the master, in forming his conclusions and making his findings, acted only upon such evidence as was properly admissible under the issues.² And it must be remembered that this rule is as rigidly applied by the chancellor, in reviewing the proceedings in the master's office, as by the upper court in passing upon the action of the chancellor. Thus, it is said that, where the error complained of is that the master admitted incompetent and immaterial evidence, his report will not be disturbed if it clearly appears that the error did not prejudice the rights of the party.³ But where incompetent evidence is admitted upon a point as well as evidence that is competent, the chancellor may be unable to say upon which the master relied in making up his findings, and to sustain a report under such circumstances it must appear that such error did not control or enter into the decision or result arrived at, or the findings will be set aside. It is otherwise where the master distinctly states that his findings are based solely on the legal proof admitted and that he wholly disregarded the incompetent evidence so admitted.⁴ It is needless to add that if, upon a review of the report of a master, the only errors discovered are harmless, the report will be confirmed.

§ 500. Correction of errors by the court.— Reports of masters in chancery are nothing but advice to the court by one of

¹ *Schroeder v. Harvey*, 75 Ill. 658; *Pardridge v. Ryan*, 134 Ill. 247, 257, 25 N. E. 627; *Goodrich v. Goodrich*, 44 Ala. 670, 682.

² *Allison v. Perry*, 180 Ill. 9, 13, 22 N. E. 492; *Powers v. Dickie*, 49 Ala. 81, 84.

³ *Kansas Pacific Ry. Co. v. Pointer*, 9 Kan. 620, 626.

⁴ *Wagener v. Finch*, 65 Barb. (N. Y.) 493, 500; *Every v. Merwin*, 6 Cow. (N. Y.) 360, 364.

its officers. No process can issue upon them; they are not choses in action. They are but steps in the progress of the cause to the decree of the court. They are not judgments or decrees of the court, but simply furnish to the court a basis upon which a decree may be entered; hence mistakes or errors therein may be remedied by a re-reference or otherwise at any time until the cause itself is finally disposed of.¹ Such report has no other force or vitality than as above stated, until it is passed upon and confirmed by the court.² This is done either by the chancellor *ex mero motu*, or the matter is brought before the court by the dissatisfied party on motion, petition, or exceptions, as the case may be.

As shown in the last two sections, immaterial errors, that is errors which do not affect prejudicially the rights of the complaining party, in other words, harmless errors, found in the report of the master, will be disregarded. Not so with material errors, which, if complained of at the proper time and in the proper manner, must be corrected. There are just two ways to make such corrections:

First. Such corrections may be made by the court without a re-reference; or,

Second. The matter must be again referred to the master, with directions to reconsider his report.

In this and subsequent sections these methods of correcting the errors of the master will be examined; and first, let us see what are the powers of the chancellor to make such corrections without a re-reference, and when such power should be exercised. In a former section of this chapter it is shown that the master is but a ministerial officer of the court, that his report is advisory only, and that it is always in the power of the court to set it aside if found to be erroneous. Yet it was also there shown that this discretion is a legal one, and cannot be arbitrarily exercised. What is the next duty of the court, after setting aside the master's findings, remains to be seen. The supreme court of Illinois say that the report of a master is but advisory to the court, and, where the chancellor is not satisfied with the report, it is within his power to de-

¹ National Folding-Box & Paper Co. v. Dayton Paper-Novelt Co., 91 Fed. 822, 824.

² Hards v. Burton, 79 Ill. 504; Ennesser v. Hudek, 169 Ill. 494, 498, 48 N. E. 673.

cline to re-refer the cause to the master, but, instead of so doing, he may consider all the testimony taken before the master, draw conclusions as to the facts established thereby and the law applicable thereto;¹ and, in another case, it is said by the same court, that where the master has made errors in his findings in stating an account, the usual course is to send the case back to the master with directions: but there is no rule of law which renders it improper for the court, having all the evidence before it, to make its own findings, and especially is this true if the correction of errors involves only simple matters, which may well be made without the further intervention of the master;² and the chancellor is not confined, in his review of the evidence, to the mere question of ascertaining whether the exceptions, or any of them, should be sustained. No rule of practice forbids the court to make additional findings, besides those set forth in the report, if the evidence returned with the report warrants and supports such additional findings.³

Whether the court will take upon itself the responsibility of making its own findings after setting aside those of the master, or recommit the cause to the master for further consideration, is largely in the discretion of the court, and depends mainly upon the nature of the error to be corrected and the facts and circumstances of the particular case. In matters of account as to whether the court will correct errors itself or recommit to the master, the matter is largely in the discretion of the court.⁴ Under certain circumstances the trial court, instead of re-referring the cause, should invariably correct errors itself by examining the testimony as reported and finding the facts therefrom.⁵ Thus, where there have already been two references in a cause, and the court has not succeeded in

¹ *Henderson v. Harness*, 184 Ill. 520, 527, 56 N. E. 786.

² *Whittemore v. Fisher*, 132 Ill. 243, 254, 24 N. E. 636; *Prince v. Cutler*, 69 Ill. 267; *Utica Ins. Co. v. Lynch*, 2 Barb. Ch. 573; *Witters v. Sowles*, 43 Fed. 405; *Kelsey v. Hobby*, 16 Pet. 269; *Parks v. Booth*, 103 U. S. 96; *Taylor v. Read*, 4 Paige, 561; *Graham v. Pierce*, 19 Gratt. 28, 100 Am. Dec. 658; *Tug River C. S. Co. v. Brigel*, 30 C. C. A. 415, 86 Fed. 818.

³ *Wolfe v. Bradberry*, 140 Ill. 578, 482, 30 N. E. 665; *Scroggs v. Cunningham*, 81 Ill. 110.

⁴ *Mosher v. Joyce*, 2 C. C. A. 322, 51 Fed. 441, 444; *Hubbard v. Camperdown Mills*, 26 S. C. 581, 588, 2 S. E. 576; *Symmes v. Symmes*, 18 S. C. 601; *Caulfield v. County of Charlestown*, 19 S. C. 600.

⁵ *Gaines v. Brockerhoff*, 136 Pa. St. 175, 19 Atl. 958; *Phillips' Appeal*, 68 Pa. St. 130.

obtaining a satisfactory report, the court may disregard the finding of the master and make the best estimate it can from the material furnished in the record and enter a decree accordingly.¹

§ 501. **Correction of errors by the court — Continued.**— Although, upon the hearing of exceptions to a master's report, it might be more satisfactory to the court and also more in accordance with practice, to refer the cause back to the master with further directions, or direct a re-argument, yet, in a case where there has already been great delay and expense incurred by the parties, the court may assume the labor of reading through voluminous pleadings and evidence in order to bring the litigation to a close, and may make such order, varying the findings of the master to suit the true state of the accounts between the parties, as to the court shall seem just and proper in the premises.² Yet, while the power of the court so to do is unquestioned, such a course is not to be commended, because, instead of reducing the litigated points down to certain definite issues, as is done by exceptions to the master's findings, which may readily be examined by the higher court, it leaves the record in such a condition that the latter court must follow the court below through the same "voluminous pleadings and evidence," or, which not infrequently happens, send the case back to the court below, with directions to re-refer the cause to the master. Where it is practicable to correct the conclusion reached by the master, upon the sole disputed fact in a cause, the court will not subject the parties to the delay and expense of a recommittal, but the court may examine the evidence and find the fact therefrom. But this of course is exceptional. "The special purpose of the appointment of a master is to save the court the time and labor of winnowing the grains of fact from the chaff of the evidence. He is paid for the performance of this duty, and the court will in general decline to perform it for him."³

§ 502. **Correction of errors by the court — Continued.**— Especially where the error to be corrected is a simple one and easily rectified, the master's report should not be re-referred,

¹ *Manufacturing Co. v. Cowing*, 105 U. S. 258, 257.

² *Saunders v. Christie*, 7 Grant's Ch. 149.

³ *Agnew v. Whitney*, 11 Phil. 298.

but should be corrected by the chancellor, and the order approving the report should specify the alteration made.¹ The same rule was laid down in a New York case, where it is said that the object of a reference to a master is for the convenience of the court; to ascertain disputed facts, and to make computations which would take up too much of the time of the court. Hence, where there is but a single item in dispute upon an exception to a report, it is the usual practice, upon the allowance of the exception, to modify the report by a decretal order, instead of sending it back to the master to be corrected.²

The following are examples of errors which should be corrected by the court without putting the parties to the trouble and expense of a re-reference: Where the master made a report finding an amount due, and nothing remains but for the court to ascertain the amount of interest upon the sum so found due, this may be done without referring the cause back to the master.³ So, too, where the evidence is before the court, upon which errors in the master's report can be corrected, the court should at once make the correction and thus avoid the expense and delay of a re-reference;⁴ or, in case the report of a master can be corrected from facts which appear in the case, outside of the report, a correction should be made without sending the report back to the master.⁵ Where the error of the master consists of an erroneous conclusion as to the law, the court, upon sustaining an exception, may correct the error at once and enter decree without a re-reference; for example, where the master's conclusion and finding is erroneous as to the priority of mortgage liens, the court, on exceptions, can change the order of privity and enter a final decree without a reference back to the master to correct the error.⁶ Thus, in a case where the master reported the amount due upon several mortgages, and also their order of priority, the court may change the order of priority without a re-reference.⁷ In a case of accounting, where the court sustains exceptions to the findings of the mas-

¹ *Teeter v. St. John*, 10 Gr. Ch. 85.

² *Taylor v. Read*, 4 Paige, 561, 567.

³ *Goodwin v. Bishop*, 50 Ill. App. 145, 421, 426, 34 N. E. 47; *Beach, Eq. Pr.*, sec. 712, note 8.

⁴ *Witters v. Sowles*, 43 Fed. 405, 407.

⁵ *Witters v. Sowles*, 43 Fed. 405, 407;

Kelsey v. Hobby, 16 Pet. 269; *Parks v. Booth*, 102 U. S. 96.

⁶ *Chance v. Teeple*, 4 N. J. Eq. 173.

⁷ *Chance v. Teeple*, 4 N. J. Eq.

173.

ter, if there are no complications in the account, the court may correct the error at once without a re-reference.¹ And again, a mere error in calculation in a master's report, although no exceptions have been taken, should be corrected without sending it back to the master.² The substance of the matter is that small errors in a master's report should be corrected by the court, even though exceptions have been sustained upon other grounds.³ For example, where an account has been stated by a master, the court may restate the account without sending it back to the master, where such misstatement requires only a slight change.⁴

Where it appears that an item excluded from the report of a master was omitted by a mere slip, as where the receipt of the money was admitted by the party accounting before the master, the court will correct it without a re-reference. The court will at almost any stage of a cause make a special order for the correction of slips of that kind in a master's report.⁵ So, too, where the error appears upon the face of the report it should be corrected at once by the chancellor without a re-reference.⁶ Such a mistake, evident on the face of the account, may be corrected by the chancellor at any time, without the necessity of an exception or a re-reference.⁷

The situation in a particular case may require that the court should refuse to recommit the matter to the master. For example, where the court re-referred a case to the master with directions to make a specific correction, but the master, instead of making the correction, reported the facts to the court on which it might be made, the court corrected the error without a second re-reference;⁸ and in another case, where the attorney of one of the parties died, after the hearing before the master,

¹ *Beale v. Beale*, 116 Ill. 292, 2 N. E. 65.

² *Utica Ins. Co. v. Lynch*, 2 Barb. Ch. 578; *Bogert v. Furman*, 10 Paige, 496; *Crossman v. Card*, 148 Mass. 152, 9 N. E. 514.

³ *Taylor v. Robertson*, 27 Fed. 537. See *Jennings v. Dolan*, 29 Fed. 861.

⁴ *Whittemore v. Fisher*, 182 Ill. 243, 24 N. E. 636.

⁵ *Morley v. Matthews*, 12 Grant's

Ch. R. 453, 455, citing *Richardson v. Ward*, 18 Beav. 110; *Ellis v. Maxwell*, id. 287; *Prentice v. Mensal*, 6 Sim. 371; *Turner v. Turner*, 1 J. & W. 39; *Turner v. Turner*, 1 Swanst. 154.

⁶ *Prince v. Cutler*, 69 Ill. 267, 271.

⁷ *Morris v. Taylor*, 23 N. J. Eq. 131; *Utica Ins. Co. v. Lynch*, 2 Barb. Ch. 573, 575.

⁸ *Bechtold v. Lippincott* (N. J.), 24 Atl. 1079.

the court declined to re-refer the matter to the master.¹ It is needless to add that if the error complained of is the omission on the part of the master to report upon immaterial matters, a motion to re-refer will be overruled.² The whole matter may be summed up in a nut-shell: If no good is to come from a re-reference and the interest of justice demands it, the court will not put the parties to the trouble and expense of a re-reference, but will end the matter at once by making the necessary correction.

§ 503. Correction of errors by the court — Continued.— It remains for us to see at what time corrections of errors may be made by the court. Of course, if the court is aware of the fact that the report of the master contains errors which should be corrected, the proper time to make such correction is when the court is called upon to confirm the report; and, if any dissatisfied party has such knowledge, he should call the attention of the court to it, and ask its correction, and, failing to do so, he may be estopped from thereafter complaining. But the power of the court to correct errors in the master's report, or in the decree based thereon, at any time, is beyond question. Even after the confirmation of a report, on the hearing of the cause on further directions, the court may refuse to act upon it, if it shall appear to be improper or unsatisfactory;³ and, even after a decree is entered, especially when entered without notice to opposite party, a mistake may be corrected by setting aside the decree and recommitting the master's report for that purpose.⁴ In a case of clear mistake where justice demands it, the court will always open up a decree for the purpose of correcting it. In a New Jersey case a defendant appeared and demurred to the bill of complainant and afterward suffered a decree *pro confesso* to be entered, a reference to the master had, an *ex parte* report of the master made, and a final decree entered and enrolled. After the expiration of more than three years on account of a gross mistake the chancellor set the decree aside and re-referred the cause to a master, with further directions.⁵ Where there was

¹ Bivingsville Mfg. Co. v. Bivings, Baldwin v. Crawford, 1 Gr. Ch. 7 Rich. Eq. 455. 202.

² Da Silva v. Turner, 166 Mass. 407, 44 N. E. 582. ⁴ Norris v. Norris, 89 Leg. Int. 256.

⁵ Taylor v. Craven, 10 Gr. Ch. 488; (3 Green Ch.) 174. ³ Miller v. Rushforth, 4 N. J. Eq.

an error in a master's report which was carried forward into all the subsequent proceedings, including the decree, it was afterward, by the master of the rolls, corrected on petition.¹ It is always within the power of the court, before the entering of a final decree, to send the case back to the commissioner, if there is such doubt as seems to require it.² Even after the confirmation of the report and the entry of a final decree, for good cause shown, the court, on motion, may set aside such decree, open up the report and set aside the order of confirmation of the report, but where the court is called upon to make a correction in a master's report after its confirmation, a much stronger showing is required. A court will be slow to encourage a party who sleeps upon his rights. Indeed, a party's negligence may be such as to absolutely estop him from making complaint.

Where a party appears before a master by counsel and fails to offer any evidence on a litigated question upon which the master afterward makes a finding, and no exception is taken to such finding, a decree based thereon will be conclusive. Upon such a case the chancellor's refusal to open the decree to allow such party to make further defense will be sustained. In a case of this kind the supreme court of Illinois say:

"The chancellor did not err in denying the petition of the plaintiff in error, filed after the decree had been entered, to open the decree and allow her to make further defense. The case was pending before the master for the taking of testimony for nearly a year before such hearing was closed and report made to the court. It appeared from the report of the master the plaintiff in error was represented by counsel before the master, and had ample opportunity to produce evidence, if any she had, in her defense, and also that no exceptions were taken to the report of the master."³

A denial by the chancellor of a motion to open the decree was held to be no error.

§ 504. Correction of errors by the court—Continued.—After a report is confirmed the court will not easily (if at all) stir it up on pretense of an omission or mistake; for the par-

¹ *Ellis v. Maxwell*, 1 Beav. 287.

² *Kingsbury v. Kingsbury*, 20 Mich. 212.

³ *Fischer v. Stiefel*, 179 Ill. 59, 58 N. E. 407.

ties had sufficient time to except to it, and if they will not mind their own business it is their own fault; much less will the court alter it if it was confirmed by consent of parties.¹ Where a party fails to file objections with the master, or if filed fails to convert them into exceptions at the proper period, and allows the master's report to be confirmed and a decretal order to be entered, courts are reluctant to reopen the case, or, as well said by the master of the rolls in *Turner v. Turner*:² "Generally speaking, a very strong case must be made out to induce the court to allow it to be discussed. There may be instances in which exceptions have been permitted to be filed out of the usual course, or even where they have been allowed when no objections had been made before; but this is only on a special case being made for such an indulgence, and it must be considered as an exception to the general rule. If parties were suffered to lie by for a long time, and then, in the last stage, to bring a complaint before the court, great mischief would be occasioned, and rules of practice, an adherence to which public policy requires, would be endangered. It is better that individuals should suffer by their *laches* than that so much delay should be caused by allowing the subject to be re-argued and agitated again at this late period." Previously in this same case the dissatisfied party made a motion to stay all proceedings under the decree, and that the master "be directed to review his report and that the plaintiffs be at liberty to take objections thereto." Upon denial of this motion Lord Eldon said: "In this case there certainly has been gross and shameful negligence;³ but after the past delay I cannot detain suitors here because a plaintiff chooses to employ solicitors who will not perform their duty; nor do I conceive that it is within the power of the lord chancellor to order a report to be reviewed, after having been confirmed by a decree of the master of the rolls, while that decree stands."⁴

§ 505. Correction of errors by the court — Continued.—
In a case where an exception is sustained to the finding of the

¹ Pr. Reg. Ch. 380.

² 1 Jac. & Walk. 89.

³ The bill was filed in 1799; in 1801 an interlocutory decree for an accounting was entered and the cause

referred to a master; in 1815 the master made his report, which was confirmed in 1816; and in 1818 the opinion of Lord Eldon was filed.

⁴ *Turner v. Turner*, 1 Swanst. 154.

master, and the report modified accordingly, the order of confirmation may be in form as follows:

Order Correcting Error and Confirming Report as Modified.

STATE OF ILLINOIS, County of Cook.	{	ss. In the Circuit Court of Cook County. To the September Term thereof, A. D. 1902.
James K. Barry v. Henry J. Bates and John L. Cameron.		Gen. No. 190,284. Term No. 8,464. In Chancery.

On this day come all the parties hereto by their respective solicitors; and this cause coming on to be heard upon the exceptions to the master's report filed herein by the complainant, and the court having heard argument of counsel and being fully advised in the premises, doth order and adjudge that complainant's exceptions numbered 1, 2, 3, 4 and 6 be, and the same are hereby, overruled; and that complainant's exception numbered 5 be, and the same is hereby, sustained; and the court finds from the evidence that the item of credit excepted to, and allowed to the defendants, to wit: sixty bales of cotton at \$50 per bale, is erroneous; and the court further finds from the evidence that, instead of said credit being for sixty bales of cotton, at \$50 per bale, said credit should be for forty bales of cotton at \$45 per bale, and that, instead of said item of credit being for the sum \$3,000, it should have been for the sum of \$1,800. It is therefore ordered and adjudged that the report of the master herein be, and the same is hereby, modified as follows: the defendants' total credit is reduced from \$6,000 to \$4,800, and the total balance due from the defendants is found to be \$11,000, instead of \$9,800, as reported by the master. It is therefore further ordered and adjudged that the said report of the master, as modified above, be, and the same is hereby, confirmed and approved.¹

§ 506. When a re-reference is proper.—The grounds or reasons rendering a re-reference proper or necessary may be classified as follows:

First. The business of the court and a proper regard for the rights of other litigants may render it necessary to re-refer the matter to the master.

Second. The question at issue may be one which was eminently proper to be passed upon by the master in the first in-

¹The above form, like all others, is given only as a guide, and must be modified to suit the facts and circumstances of each particular case.

stance, thus rendering a re-reference as necessary as the original reference.

Third. The additional labor to be performed may be of such a nature that it can be better done by the master than by the court.

Fourth. The report itself may be so defective as to render a re-reference absolutely necessary.

Fifth. Re-reference may be necessary for the purpose of taking additional evidence.

Sixth. After the coming in of the report the court may alter or modify the order of reference, and thus create a necessity for a re-reference.

Barton, in his Chancery Practice, gives the following statement of the most usual grounds of re-references:

The failure of the master to report fully upon the subjects referred to him;¹ the vagueness and uncertainty of the report;² the allowance of a claim upon insufficient testimony, where there is reason to suppose that more evidence can be adduced;³ the return of the report before all evidence is in, a good excuse being given for the delay,⁴ and the fact of the master having exceeded his authority,⁵ have all been determined to be good reasons for recommitting a report, even where there are no exceptions.⁶

These and other grounds are examined more in detail as follows: The general rule is for the court, upon sustaining exceptions to a master's report, to settle the matters involved by an order and again refer the cause to the master for further action in compliance with such order.⁷ While it is the general rule that, when exceptions are sustained to a master's report, the court should settle the matters involved, and again refer the cause to a master, yet, where the exceptions sustained relate to but few items, and the matter to be restated is simple, and there are before the court facts sufficient to enable it

¹ Harris v. Magee, 3 Call, 502; Schultz et al. v. Hansbrough et al., 33 Gratt. 567.

² Minor's Inst., vol. 4, pt. 2, p. 1250.

³ Williams v. Donaghe, 1 Rand. 800.

⁴ Thomas v. Dawson, 9 Gratt. 531; Dan. Ch. Pr., vol. 2, p. 1818, note;

Brent's Adm'r v. Senseny. This is a Virginia case cited as not reported. See 2 Barton's Ch. Pr., p. 655, note.

⁵ Dan. Ch. Pr., vol. 2, p. 1820.

⁶ 2 Barton's Ch. Pr. 655.

⁷ Beale v. Beale, 116 Ill. 292, 5 N. E.

to dispose of the cause without subjecting the parties to further expense, it may properly do so.¹ It is discretionary with the court, on reviewing the report of a master, to correct errors found therein or to return it to the master for revision, and in determining whether the court ought to re-refer the cause or not, it will take into consideration the length of time which has elapsed between the hearing before the master and the hearing before the chancellor,² and if such length of time is so great that it may reasonably be supposed that the master has forgotten the appearance of the witnesses while testifying before him, the court may proceed to find the facts from the evidence returned by the master; but this is a power the court will rarely exercise.³ Upon sustaining an exception to an item of charge in the report of a master wrongfully allowed by the master, the report should be corrected by striking out such item.⁴ In such case no re-reference is required, for the master could but obey the mandate of the court to strike out the improper charge, and this may as well be done at once by the court. The same rule would apply to any number of items improperly allowed by the master. But if the allowance of the exceptions, or any of them, renders it necessary to refer the matter back to the master to review his report, the court will again refer it to the master for review, and the reservation of further directions, and the costs of the suit, are continued until after the master shall have made his report.⁵ Exceptions may be allowed in part and overruled in part, and the master directed to review his report as to the part relating to the exceptions allowed;⁶ and where the chancellor allows an exception in part, he may direct the master to review his report on other grounds independent of those made in the exception.⁷

In the following cases it is held that the proper course is to re-refer the cause to the master: Where the nature of the matter contested or the frame of the exceptions is such that

¹ *Smyth v. McKernan*, 41 Ill. App. 182, 187; *In re Hemiup*, 8 Paige, 805, 808; *Whittemore v. Fisher*, 182 Ill. 243, 254, 24 N. E. 636; *Pool v. Dial*, 10 S. C. 440, 445; *Taylor v. Read*, 4 Paige, 561, 568.

² *Gaines v. Brockerhoff*, 26 W. N. 258, 260.

³ *Id.*

⁴ *Hollingsworth v. Koon*, 117 Ill. 511, 16 N. E. 148.

⁵ 2 Smith's Ch. Pr. 846.

⁶ *Id.* See also *Knight v. Maclean*, Reg. Lib. 1790, folio 102.

⁷ *O'Reilly's Adm'r v. Brady*, 28 Ala. 530, 535.

their allowance shows a necessity for further investigation;¹ or where the facts are imperfectly stated in the report so that no judgment can be formed as to the proper conclusion;² or where the report is based upon erroneous views of the master on important matters;³ or where the report shows upon its face that there are other matters necessary to be investigated and reported upon, to enable the court to determine the rights and interests of the parties;⁴ or where the master disregards the instructions of the court in the order of reference, or the report upon its face does not furnish the facts necessary to enable the court to proceed to a final decree on the merits, the court will refer the cause to the master, although no exceptions are taken.⁵ So, too, if the chancellor is satisfied that the master has committed a gross and palpable error, in any matter of fact, to the injury of a party, it is his duty to recommit the report, in order that such error may be corrected.⁶

§ 507. When a re-reference is proper — Continued. — Where both parties proceed on an erroneous theory as to the rules of practice, and for that reason the chancellor is unable to review the report, or to pass upon the questions attempted to be presented, the court will re-refer the cause to enable the parties to set themselves right; for example, where both parties proceed on the assumption that the report is to be read by the chancellor, in the light of the evidence, papers and books which the master had before him; and that the master's findings might be both explained and supplemented by a reference to these, the court referred the cause back to the master.⁷ So, too, when the master receives improper testimony, and upon the testimony, as reported, it is hardly possible to separate the parts which should have been rejected from those which should have been received, and the court can see that the improper evidence so received had an extensive influence upon the master's findings, the master should be directed to

¹ Adams' Equity (7th Am. ed.), 886. ¹⁴ Blatchf. (U. S.) 109, 115, 117, Fed.

² Adams' Equity (7th Am. ed.), 886; Cas. 8,950.

Pinneo v. Goodspeed, 120 Ill. 524, 12
N. E. 196; Waterman v. Buck, 63 Vt.
544, 23 Atl. 15.

⁵ Lang v. Brown, 21 Ala. 179, 190, 56
Am. Dec. 244.

³ Blauvelt v. Ackerman, 20 N. J.
Eq. 141.

⁶ Donnell v. Columbian Ins. Co., 2
Sumn. 366, 371, Fed. Cas. 3,987.

⁴ Magic Ruffle Co. v. Elm City Co.,

⁷ Gould v. Burritt, 11 Grant's Ch.
R. 284.

review his report; and, in a case where the master is no longer in office, the cause should be again sent to a master to execute the former order of reference.¹

Where the master wholly misconceives the purport of the order of reference by reporting upon a matter not submitted to him, the matter will be recommitted to him with instructions to proceed to the discharge of his duty under the order. For example, in the foreclosure of a mortgage there was a reference to the master "to take testimony as to the amount, if any, due under said mortgage, and to report the same to the court." The master disregarded these directions by proceeding to investigate and report upon the validity of the mortgage, finding that the mortgage was a nullity and recommending that it be decreed null and void. The court thereupon ordered "that the report be recommitted to the master to inquire and report on the case as provided in the original order, using any competent testimony heretofore taken before him, and such other testimony as may be introduced before him." This order was obeyed by the master and the second report approved by the court.²

Vagueness and indefiniteness of masters' reports afford another fruitful source of re-references. In Georgia it is held that if the report of a master is so vague, indefinite and uncertain that no legal judgment could be rendered upon it, the judge on his own motion may recommit the same to the master at any stage of the case; but when the master's report is sufficiently definite and full to authorize the judge to enter up a judgment upon the same, if counsel desired to take advantage of any defect in the report, no matter of what character, it must be done, by filing exceptions within the time limited by the code — twenty days from the date the report is filed and notice given.³ If the report is uncertain in any particular the court may re-refer the matter to the master with directions to make the same more definite and certain, or to report to the court whether the construction placed upon it by the court is correct or not.⁴ If the report is so indefinite that it cannot be determined what items in the accounts of the re-

¹ *Armsby v. Wood, Hopkins' Ch.* 261, 263.

² *Connor v. Edwards*, 86 S. C. 563, 15 S. E. 706.

³ *Littleton & Lamar v. Patton & Co.*, 112 Ga. 438, 443, 37 S. E. 755. See also *Reynolds v. Martin*, 55 Ga. 628.

⁴ *Boston Iron Co. v. King*, 2 Cush. 400.

spective parties are allowed or disallowed, the cause should be recommitted to the referee for more definite findings.¹

§ 508. When a re-reference is proper — Continued.— Applications are frequently made to the court for re-references to enable the parties to take further evidence, and it is safe to say that more re-references are granted for this purpose than for any other. We have already seen that, in case of a reference to a master, the rule is imperative that all the evidence must be taken before him.² Hence, if by accident, inadvertence, surprise, mistake or want of knowledge material evidence is not submitted to the master, and the interest of justice demands that it should be heard, there is, practically, but one course to be pursued, and that is to recommit the matter to the master, with directions to admit and consider the desired evidence. True, the court may, by stipulation of parties, admit additional evidence on the hearing, but such a course wholly destroys the effect of the master's findings, and compels the court to consider the whole evidence — that returned by the master together with the additional evidence taken before the court — and make its own findings therefrom. As a rule, therefore, the far better course is, in such a case, to re-refer the cause to the master with further directions. But, before such a course is taken, the court must be satisfied that the interest of justice demands it. For this purpose rules and regulations are prescribed by the courts, governing applications of this character, which must be carefully adhered to.

Before such an application can be granted the court must be satisfied:

First. That the desired evidence is material. For this purpose the party desiring the re-reference must place before the court the evidence proposed to be introduced, so that the court can judge as to its materiality.

Second. That such evidence is important. The court will never grant a re-reference to enable a party to procure further evidence, when, in case such evidence is obtained, the result will and ought to be the same.

¹ *Mast & Co. v. Lockwood*, 59 Wis. 48, 17 N. W. 548.

² *Prince v. Cutler*, 69 Ill. 272; *Cox v. Pierce*, 120 Ill. 556, 12 N. E. 194;

Allison v. Perry, 180 Ill. 9, 22 N. E. 492. For other authorities see *ante*, §§ 475, 476.

Third. The applicant for a re-reference must further show that he used reasonable diligence to introduce such evidence before the master, that his failure so to do was the result of accident, inadvertence, surprise or mistake.

Fourth. If the application is based on the ground of newly-discovered evidence, he must show to the court when, where and under what circumstances such discovery was made, and why it was not made sooner.

Where a party insists that for some reason he failed to get in all his evidence before the master and asks for a re-reference to enable him to produce it, counsel should satisfy the court that he has additional, material evidence to offer that would probably change the result. The court will not send a matter back to the master to have the accounts again examined to see if the discovery of a mistake is possible.¹ For this reason if a motion is made to re-refer a case to the master, for the purpose of taking additional testimony, and it appears that the testimony to be taken is merely cumulative, it is in the discretion of the court to grant or deny the motion.² But, in a case where the master erroneously excludes competent evidence, and the court, upon a review of his findings, cannot determine that they were not influenced by the absence of the excluded evidence, the court will re-refer the cause, with directions to admit the excluded evidence and thereupon to reconsider the proofs, and again report his conclusions.³ Although the proofs in a cause may be closed, yet the court may, if the interest of justice demands it, open the same and admit further testimony where the additional proofs offered were omitted by inadvertence of counsel;⁴ and in such a case the court will direct the matter to be re-referred to the master,⁵ and it has even been said that where it is possible that other evidence exists which would alter the master's report, the cause may be re-referred.⁶ Courts of equity are lenient in opening up a case, where justice requires it, to let in additional evidence where the "insufficiency of the proof is due to inadvertence of counsel."⁷ But,

¹ Van Ness v. Van Ness, 32 N. J. Eq. 669.

² Maher v. Shenhall, 96 Iowa, 634, 65 N. W. 978.

³ Marks v. Fox, 18 Fed. 713.

⁴ Sharp v. Wyckoff, 39 N. J. Eq. 95.

⁵ Beckmann v. Hoboken Bank, 37

N. J. Eq. 331. See same case, 36 id. 83.

⁶ Adams' Equity (7th Am. ed.), 386.

⁷ Sharp v. Wyckoff, 39 N. J. Eq. 95.

where the party has had every opportunity to take his evidence before the master, the hearing having been repeatedly adjourned for that purpose, the court will decline to re-refer the cause to the master "to finish the evidence." To sustain such a motion it is incumbent upon the party to show that he used proper diligence to present his evidence before the master.¹ The same rule was applied in a case in the federal court. Where the master has, at the request of parties, repeatedly adjourned a cause for the purpose of taking further evidence, and has, at their request, or with their knowledge, adjourned a matter to a certain day with the understanding that the hearing on the adjourned date would be peremptory, a refusal upon his part to adjourn the matter further for the taking of testimony is within his discretion, and in such case his discretion will not be interfered with by the court, unless there appears to be a clear abuse of the same.²

§ 509. When a re-reference is proper — Continued.— If an error in a master's report is caused by a failure of the exceptant to lay before the master material evidence which was within his power, the chancellor should not direct the master to review his report except on the terms that the exceptant shall pay the costs.³ When a motion is made to recommit a cause to the master to enable the party to introduce further testimony, which was within his knowledge at the time of the hearing before the master, and his failure to introduce it was not brought about by accident, inadvertence or mistake, and he fails to support his motion by an affidavit showing that he can hereafter produce such testimony, the court will overrule such motion. Where litigants have an opportunity of presenting their case fully, and elect to proceed on a certain theory as to their rights, which is subsequently not sustained, and then move to reopen the cause for proof upon another theory, some good showing should be presented to support such motion,⁴ but, if the master, under an erroneous belief as to his duty, precludes a party from offering further evidence, and

¹ Gould v. Elgin City Banking Co., 186 Ill. 60, 63, 86 Ill. App. 390, 394, 26 N. E. 497.

² Third Nat. Bank v. Nat. Bank, 80 C. C. A. 436, 86 Fed. 852, 857.

³ Hedges v. Cardonnel, 2 Atk. 408; Smith v. Billings, 170 Ill. 543, 49 N. E. 212.

⁴ Mosher v. Joyce, 2 C. C. A. 322, 51 Fed. 441, 444.

there is strong reason to believe that justice has not been done and that the introduction of further evidence is necessary in order to enable the court to enter a satisfactory judgment, the matter will be re-referred to the master for the taking of further evidence.¹ Upon a refusal of a master to grant a reasonable request for an adjournment made in good faith to enable such party to produce further testimony, it is the duty of the chancellor to refer the matter back to the master with directions to afford such party an opportunity to produce such further testimony.² If a party taking exceptions had it in his power to lay material evidence before the master, which would have modified or changed the master's report, the court, on referring the matter to the master for review, may impose terms.³

The exact time when the master's authority to admit further evidence terminates is a point not definitely settled, the holdings of the courts not being uniform upon the subject. The question arises sometimes in determining whether or not a party had an opportunity, after the discovery of the evidence, to make application to the master for its introduction. This subject is fully discussed in a former chapter.⁴

Under the English chancery practice all the testimony in a chancery proceeding was taken upon written interrogatories, or, as we would say, by deposition. As neither the parties nor counsel were permitted to be present they of course knew nothing as to the contents of such depositions until publicly opened or copies given out. Under this practice, after *publication had passed*, as it was termed, no further testimony could be taken except on special order of the court. What is technically a publication under our practice, where everything is done in public, may be difficult to define, but the supreme court of Rhode Island held that after the testimony had been closed and a draft of his report had been handed to the parties by the master, publication of the testimony had passed, and that "the master could not, and the court would not, reopen the case for further testimony, not newly discovered, where the testimony

¹ Van Ness v. Van Ness, 82 N. J. Eq. 729.

² Tucker v. Tucker, 28 N. J. Eq. 223; Douglas v. Merceles, 24 N. J. Eq. 25.

³ 2 Maddock's Ch. Pr. 389; Hedges v. Cardonnel, 2 Atk. 408.

⁴ See *ante*, §§ 275, 276.

had been closed, without mistake or surprise, with the assent of all parties.”¹

§ 510. When a re-reference is proper — Continued.— Under some circumstances the court will very reluctantly grant a motion for a re-reference to take further testimony, and will overrule it if it can find any reasonable excuse therefor. Therefore, in cases where there has been great delay in the proceedings, and especially in the master’s office, the court will decline to order a re-reference, unless the error committed by the master is of such a character as to absolutely require it. For example, where the error complained of consists in the improper admission of evidence by the master, it may be stricken out, or disregarded, by the court, though this may leave the proofs in a confused and fragmentary state; but, where evidence has been improperly rejected, there is but one remedy in jurisdictions where such questions are reserved till the coming in of the report, and that is to re-refer the cause with directions to the master to admit the evidence, or else confirm the report in spite of this error, as the necessity of the case requires the court to do. In a case of this character² the great delays attending the course pursued illustrate the importance of the practice of at once appealing to the court, during the progress of a hearing, to correct errors of the master in this regard. In commenting upon this point, Judge Shipman remarks: “Ten years, two months, and five days have already been consumed in taking the proofs on this reference, and nearly two years more in settling the report. From what we know of this controversy, after devoting months to a diligent and laborious examination of the evidence, we have no doubt that another reference would consume years. Such a result is almost certain, in view of the fact that the reference would have to be to a new master, who would, in order to discharge his duty intelligently, have to examine the whole case, and, perhaps, make a new report. Such a course might be practicable were human longevity equal to what it was in the antediluvian ages.

¹ *Burgess v. Wilkinson*, 7 R. L. 81, 82. As to what was meant by *publication passed* under English practice, see 3 Bl. Com. 450. For applica-

tion of rule under 67th Order, 1828, see *Trotter v. Trotter*, 5 Sim. 388.

² *Troy Iron & Nail Factory v. Corning*, 6 Blatchf. 328, 334, Fed. Cas. 14,196.

But, as twenty years have been spent in this litigation, we think that the interests of all parties require that it should be brought to a close, if this can be done by a strict application of the rules of practice. This cannot be done, however, during the present generation, if the case is again to go to a master. We therefore apply the rule strictly, and dismiss the fourteen hundred and seventy-two exceptions to the rulings of the master in rejecting or receiving evidence, on the ground that they were not taken in time, and are irregularly before the court."

After the master has closed the reference an application may be made to him at any time before the report is signed to admit further evidence.¹ But after the report is signed application can only be made to the court.² To justify the granting of such an application the applicant in general should make out such a case as would entitle him to a new trial.³

§ 511. When a re-reference is proper — Continued.— In some other cases courts are equally as reluctant to grant a re-reference for the purpose of permitting parties to introduce further evidence. Courts are very reluctant to grant a re-reference for the purpose of taking further testimony where the object is to contradict or supply defects or omissions in evidence already taken before the master. The same principle applies here that prevails in courts of law in granting new trials. A new trial will not be granted if the party has not used diligence to prepare himself for the first trial, because, among other objections, it will tend to introduce fraud and perjury, by taxing the ingenuity of a party, after the disclosure of his adversary's strength, to supply all deficiency of testimony on his side.⁴ Chancellor Kent says, in speaking of a motion of this character: "It is of great importance in the administration of justice, and ought to be constantly inculcated upon suitors, that they must bestow *diligence* in the prosecution and defense of their suits, and that every step in the progress of the cause is to be taken *orderly* and in *due sea-*

¹ *Re Ritchie, Sewery v. Ritchie*, 28 Gr. Ch. 66, 69; *ante*, § 276. 112; *Mason v. Seney*, 12 Gr. Ch. R. 143; *Hosking v. Terry*, 8 Jur. (N. S.) 975, 977.

² *O'Donohue v. Hembroff*, 9 Can. L. J. 312.

³ *Waddell v. Smyth*, 3 Ch. Chamb. R. 412; *Patterson v. Scott*, 1 Gr. Ch. 582; *Carradice v. Currie*, 19 Gr. 108,

⁴ *Hamersly v. Lambert*, 2 Johns. Ch. 482, 483; *Knox v. Work*, 2 Binney, 582, 585.

son; and that, though the courts are indulgent to mistakes and unavoidable accidents, they cannot be so to the mere negligence or wilful defaults of parties, which only tend to hinder, affect and oppress each other.”¹

Chief Justice Brickell, of the supreme court of Alabama, says, in speaking of the rule disallowing the re-examination of a witness, except under special circumstances, that “it is founded on the soundest policy and highest wisdom, and it is feared that it is not enforced as rigidly as the ends of truth and justice require. It is not only a safeguard against fabricated evidence, but it quickens and keeps alive the diligence of suitors.”² The re-examination of a witness, after the evidence has been “critically discussed in court, and the power and effect of every part of it understood and judicially settled, simply opens a door to fraud and perjury, by holding out or encouraging inducements to supply insufficient evidence, or to withdraw or explain away that which has been oppressive.”³ Chancellor Kent goes even so far as to say: “There never was a re-examination permitted, merely to alter and correct testimony, after the cause had been heard and discussed, and decided upon from matters of fact to which that testimony referred. It would be setting a most alarming precedent, and would shake the fundamental principles of evidence.”⁴

Courts of equity are always desirous that the examination of witnesses should be as far as possible *uno acto*, and that, whenever it can be accomplished, no opportunity should be afforded after a witness has once signed his deposition, “and turned his back on the examiner,” of tampering with him, and inducing him to retract, or contradict, or explain away what he has stated in his first examination; hence, the report of a master will not be referred back for the purpose of re-examining the witness or taking further testimony, unless in case of a mistake or omission on the part of a witness or examiner.⁵ To this rule there are exceptions, but in granting leave for re-examination or taking further testimony the court will exer-

¹ *Hamersly v. Lambert, supra.*

⁴ *Id.*

² *Harrell v. Mitchell*, 61 Ala. 270, 277.

⁵ *Nece v. Pruden*, 8 Phila. 850; 2 Daniell, Ch. Pr. 1150; *Adams' Eq.*

³ *Gray v. Murray*, 4 Johns. Ch. 412, 414.

872.

cise extreme caution to prevent any undue advantage being taken, new matter improperly thrust into the cause, or causing surprise¹ to the attorney upon the opposite side. It would not be a wise discretion to permit a party to endeavor to make a new case, or fortify a weak one by going again into the witness box, when he was there once and might have told his whole story.² In determining whether the court will re-refer a cause to enable a party to take further testimony, the court "must look not only to the necessity of excluding, by every possible safeguard, impure testimony, a consideration of vital importance to the general administration of justice, but also to the importance of enforcing the orderly conduct of the business of the court."³

The party must show three things:⁴

First. That the newly-discovered evidence came to his knowledge, for the first time, after the period when he might have used it before the master.

Second. That he could not, with reasonable diligence, have discovered it in time to have so used it.

Third. That if it had been brought forward it would have probably altered the result.

In a case where exceptions were filed to a master's report, where it was shown to the court that two of the witnesses had made mistakes in their testimony before the examiner, the court directed the case to be again referred to the master with directions for each witness to appear before him and correct the mistakes. The court say: "That an application like the present one ought not to be favored is admitted, but that the power to refer exists, cannot be denied. That any one may be satisfied with the entire correctness of the principle, let him examine the standard authorities, and we think he will be satisfied. The general rule undoubtedly is, that the testimony once closed shall not be again opened; but the exception is as well defined as the rule itself, and has been frequently acted upon by courts of equity. In *Denton v. Jackson*,⁵ Chancellor Kent, after publication passed, and cause set down for hearing,

¹ Id.

⁴ *Hosking v. Terry*, 8 Jur. (N. S.)

² *Re Ritchie, Sewery v. Ritchie*, 23 Gr. Ch. 66, 69.

⁵ 1 Johns. Ch. 526.

³ *Patterson v. Scott*, 1 Gr. Ch. 582.

permitted a witness to be examined, because the examiner had made a mistake in taking down his testimony. The chancellor said: 'The application of this kind must rest in discretion, and great caution is requisite to prevent abuse.' Adams, in his Treatise upon Equity, 372, declares that 'the rule excluding evidence after publication passed is subject to the discretion of the court.' See also 2 Daniell, Ch. Pr. 1150. In *Nice v. Pruden*, 8 Phila. R. 350, Allison, P. J., while affirming the general rule, distinctly states the exception to it. In the case before us it appeared that two reputable witnesses made a clear mistake in a portion of their testimony. The exercise of our discretion, on behalf of the defendants in this instance, was an act of wisdom."¹

§ 512. *Re-reference — Question, how raised.*— The question whether the cause shall be re-referred to the master, on the coming in of his report, may arise in either one of the following ways:

First. The court may, upon inspection of the report, find it defective and order a re-reference.

Second. The question may be brought directly before the court on motion or petition by the dissatisfied party.

Third. The question may arise on exceptions being sustained to the master's findings.

Fourth. It may arise upon the application of the master for leave to withdraw his report for the correction of errors.

In case a party makes an offer before the master, in apt time, to introduce his evidence, or is prevented from so doing by surprise or mistake, his proper remedy is, upon the coming in of the report, to move the court to recommit the cause to the master for the purpose of allowing him to introduce such evidence.² If the master, upon such application of counsel to postpone a cause to enable him to introduce further evidence on part of his clients, refuses to grant the request, the court, if the request seems to have been reasonable, upon a motion for that purpose, may refer the case back to the master with directions to admit the testimony; but such an irregularity can never be reached by excepting to the report. Irregularities in the proceedings before the master must be brought before the

¹ *Burton's Appeal*, 93 Pa. St. 214, 216. ² *Thomas v. Dawson*, 9 Gratt. 581.

court by motion, to correct the error (if the report is not yet made), or, if the report has been made, then by motion to re-refer with directions.¹ This is the regular method of correcting irregularities of every kind occurring during the progress of a hearing in the master's office.

If the master omits to report some of the matters which by the order of reference he is directed to report upon, such failure cannot be corrected on exceptions to his report, but the remedy of a party, in such a case, is to move that the report be referred back to the master, with instructions to him to correct the report, so as to make it embrace the whole matters of the reference.² Therefore the same remedy applies where the alleged error is that the master did not give the party an opportunity to introduce his testimony. The proper course is to move to refer the report back to the master with directions to receive the testimony, but the court will not make such order unless the party furnished the "master with his own affidavit, showing what witnesses he wished to examine, and the particular facts which he wished and expected to establish by them."³ And it should further appear to the court that such party made application, in good faith, to the master, for leave to introduce such testimony and that such application was denied. This rule has no application where the master makes a finding upon a subject but the finding is *defective*, as in such case the proper remedy is by exception, but only applies to cases where the report is *absolutely silent* upon a subject submitted to him by the order of reference.⁴

§ 513. Re-reference — Question, how raised — Continued.— A party asking a re-reference to a master for the purpose of taking further testimony on his part must, by affidavit or otherwise, disclose to the court the names of the witnesses and the facts he expects to prove by them. Such a motion is in the nature of a motion for a continuance based on the ground that witnesses are absent whose testimony is ma-

¹ Douglas v. Merceles, 24 N. J. Eq. 25.

² Stevenson v. Gregory, 1 Barb. Ch. 72.

³ Tyler v. Simmons, 6 Paige, 127, 130.

⁴ On the proper method of correct-

ing irregularities during the progress of a hearing, see *ante*, §§ 813 *et seq.*; and for method of correcting such irregularities *after* the coming in of the report, see this chapter, *ante*, §§ 427 *et seq.*

terial to the issues, or in the nature of a motion for a new trial based on the ground of newly-discovered evidence. In either of these cases the party must disclose to the court the facts he proposes to establish so the court can judge of their materiality and whether the ends of justice will be promoted by granting the motion. Thus, in a Tennessee case, a complainant moved to recommit the matter to the commissioner on the ground that it was agreed that when the defendants concluded their proof he was to be notified so that he could put in evidence in rebuttal on the part of the complainant, and in violation of this agreement the report was returned at once into court without any notice to complainant's solicitor and without any opportunity to offer his evidence. The motion was based on an affidavit showing these facts, but the affidavit failed to disclose the names of the witnesses or the facts proposed to be established upon the re-reference. It was held by the court that the affidavit was insufficient in this regard, the court holding that it should have been informed what the evidence was which was proposed to be offered, so it "could have judged of its weight, value and relevancy," and for this reason the motion was held properly overruled.¹

The necessary facts, however, may be shown to the court by the minutes of the proceedings in the master's office, duly certified by him, in which case no affidavit is necessary. If a party desires to question the action of the chancellor in revising a master's report instead of re-referring the cause to the master for correction, he must move the court at the proper time for such re-reference.² Such re-reference may be at the instance of one of the parties to the suit, or the master himself may ask the court to return his report to enable him to correct an error by amendment. It is true that when the master files his report he becomes as to it *functus officio*, and he cannot thereafter alter or amend it unless the court again clothes him with official authority by a recommitment. The order of the court giving to the master leave to withdraw his report for amendment necessarily gives him the authority to make an amended report, and he is as much a master of the court when

¹ Rouss v. Kendrick, 41 S. W. 1074, 1077, 1078.

² Whittemore v. Fisher, 132 Ill. 243, 254, 24 N. E. 636.

he makes the second report as when he makes the first.¹ When such re-reference is only to correct a formal error, no additional notice need be given to the parties, but, if it is desired to make material alterations of the findings, the master must bring the parties before him again by notice. He has no right, "upon a re-reference for amendment, to reverse his rulings upon the evidence and law without giving the parties notice. Such a re-reference is to be assimilated to the granting of a rehearing by the court after decision, in which the practice always is to give the parties a full opportunity to rediscuss the merits, before an order is made reversing the former ruling."²

§ 514. Re-reference — Question, how raised — Continued. Such motion must not only be supported by an affidavit showing the facts above stated, but it must be made in due time; in other words, a party must be diligent in making his application. This rule as to diligence requires that a party, if he has knowledge of the existence of the evidence, should make an effort in apt time before the master, and, failing to secure its admission, that he should renew his effort at once upon the coming in of the report. After a report has been filed, exceptions thereto taken and argued, and the findings of the master sustained, it is too late for the defeated party to have the case re-opened to take additional evidence in support of some theory expressed by the master in his report.³ After a submission of the cause to the chancellor upon its merits it will not be re-referred for the purpose of taking additional evidence, except under most unusual circumstances. To justify such a course there must be proof of clear inadvertence, omission or mistake of some sort.⁴

This rule as to diligence in making a motion for a re-reference for the purpose of taking further evidence applies to motions for re-references for all other purposes as well; that is, if the party has knowledge of the necessity of such a re-reference before such submission upon the merits. It may be that an unexpected ruling of the court, made upon the hearing, de-

¹ National Folding-Box & Paper Co. v. Dayton Paper-Noveltty Co., 91 Fed. 823, 824.

² Id. 825, 826. For a full discussion of the duties of the master upon a re-reference, see *ante*, §§ 336-339.

³ Central Trust Co. v. Georgia Pac. Ry. Co., 88 Fed. 386, 399; Clyde v. Richmond & D. R. Co., 59 Fed. 394, 398.

⁴ Central Trust Co. v. Georgia P. R. Co. (C. C. N. D. Ga.), 81 Fed. 277.

velops, for the first time, the necessity or importance of a re-reference, in which event the party desiring it should at once make his application for a re-submission. So, too, the court may at any time, *sua sponte*, re-refer the cause to the master, if the interest of justice, as between the parties, or public policy, seems to require it. For example, in case the court finds upon exceptions taken that the account is not correctly stated, it should, with proper directions, re-refer the matter to the master for him, in accordance with its order, to restate the account.¹ Or it may be that the evidence taken and reported by the master indicates to the court that the parties have been engaged in an immoral transaction, in which event the court may re-refer the cause to the master with directions to inquire into the matter further, in which case the master may be directed by the court to extend his inquiry beyond the issues raised by the pleadings. A recommitment to the master usually must be to examine into some point raised under the issue made by the pleadings; but when the evidence taken by the master and returned to the court discloses an immoral transaction as the probable basis of the cause, the report may be recommitted with directions to inquire whether there was really just ground for the charge.²

§ 515. Order of re-reference — Form of.— Where a re-reference is required upon exceptions sustained to a master's report, such order may be in the following form, varied to suit the circumstances of the particular case:

Order of Re-reference.

STATE OF ILLINOIS, } County of Cook. }	ss.	In the Circuit Court of Cook County. To the July Term thereof, A. D. 1902.
Jesse T. Masters } v. } Aaron M. Hart. }	In Chancery.	

On this day come all the parties hereto by their respective solicitors, and this cause coming on to be heard upon the exceptions to the master's report filed herein, and the court, having heard argument of counsel and being fully advised in the premises, doth order and adjudge that the exceptions num-

¹ Beale v. Beale, 116 Ill. 292, 5 N. E. 540; Minchrod v. Ullman, 60 Ill. App. 400, 408, 168 Ill. 25, 44 N. E. 864. ² Watson v. Fletcher, 7 Gratt. 1; Minor's Inst., vol. 4, pt. 2, p. 1250.

bered 1, 4, 6, 7 and 9, filed by the complainant, be, and the same are hereby, sustained; that exceptions numbered 2, 3, 5 and 8, filed by the complainant, be, and the same are hereby, overruled; that exceptions numbered 1, 3, 7, 8 and 11, filed by the defendant, are hereby sustained; that exceptions numbered 2, 4, 5, 6, 9 and 10, filed by the defendant, be, and the same are hereby, overruled. And the court, not being sufficiently advised by the report of the said master as to certain matters of fact, which are material to a just and equitable determination of all the issues formed in this action, doth order that the report of the master be, and the same is hereby, referred to him for review, and a further statement of the account, or accounts, involved in this cause, and, for this purpose, he is ordered to restate the said account; and he is hereby further ordered and directed: [*Here give specific directions.*]

And he is further directed to ascertain and report any other matter or thing connected therewith that may be of service to the court in determining the rights and equities of all parties to this action. And, to the end that he may carefully and efficiently discharge the duties devolved upon him by this order, he is authorized to take additional evidence relative thereto, and to consider, in making up his report, the same in connection with the pleadings, and all competent evidence previously taken by or submitted to him, and to report the evidence taken by him, together with his conclusions thereon, to the court.¹

§ 516. Order of re-reference — Form of—Continued.— In case the master fails to report fully upon matters submitted to him, and a re-reference is necessary, with further directions, the order may be as follows, varied, of course, to suit the circumstances:

Order of Re-reference.

STATE OF ILLINOIS, County of Cook.	}	ss.	In the Circuit Court of Cook County. To the July Term thereof, A. D. 1902.
Jesse T. Masters v. Aaron M. Hart.	}		In Chancery.

And now on this day the above cause coming on to be heard upon the motion of the complainant to re-refer the same to the master, for the reason that the said master has failed to fully report upon all the matters submitted to him by the order of reference heretofore entered herein; and all parties hereto being present by their respective solicitors, and the court having heard arguments of counsel, and being fully advised in the premises, doth order and adjudge that the said motion be, and

¹ Adapted from Martin's Ch. Decs. 511.

the same is hereby, sustained, and that the said cause, and the matters and things contained in the report of the said master, be, and the same are hereby, re-referred to him for consideration; and to the end that he may be able fully to comply with the order heretofore entered, he is hereby ordered and directed: [*Here give specific directions.*]

And for this purpose he is authorized and empowered to take additional evidence, and to consider the same in connection with the pleadings, and all competent evidence heretofore taken or submitted to him, and to report the evidence, together with his conclusions thereon, to the court.

In case of a re-reference it is always competent for the court to direct the master to consider all the testimony taken on the original reference, as well as that to be taken upon the re-reference, and report his conclusions of law and of fact. The same course is proper in a case where the upper court reverses the cause with directions to re-refer to the master with liberty to take additional testimony.¹

§ 517. Order of reference — Modifying — Setting aside.— Upon the coming in of the master's report the chancellor may set aside the order of reference and dismiss the complainant's bill if he becomes satisfied that justice requires it. All interlocutory orders are subject to alteration, modification or abrogation at any time until the entry of the final decree. Not only has the chancellor this power, but it is his duty to promptly exercise it whenever he is convinced that he has committed an error. The question is properly brought before the chancellor by a motion to alter, modify or set aside the order, as such order cannot be attacked by exceptions. He may, however, upon his own motion, at any time, alter, modify or set aside the order if the interest of justice, in the judgment of the court, requires it.² The power of the court in this regard is unquestioned. Interlocutory orders are always open for revision until final decree is entered in the cause. Even a final judgment or decree is said to be in the breast of the court until the term is closed at which it was entered. Hence it is within the power of the court to modify or set aside an order of reference upon hearing of exceptions to the master's report, if for any reason the court upon further reflection or exami-

¹ *Aurora & G. R. Co. v. Harvey*, 178 Ill. 477; *Assets Realization Co. v. Wightman*, 105 Ill. App. 618, 621.

² See *ante*, §§ 157, 158.

nation changes its opinion.¹ Upon a hearing of exceptions to a master's report all the previous interlocutory orders in relation to the merits are open for revision, and under the control of the court, and it is not only the right but the duty of the court to set aside such previous interlocutory orders and dismiss the cause, if upon further reflection or examination the court believes such former orders erroneous.² On the hearing of exceptions to a master's report the court may dismiss the bill, if the court changes its mind as to the right of the plaintiff to recover.³ Even after the coming in of the master's report, if the court discovers that the order of reference is uncertain or ambiguous, it may of its own motion correct the order of reference and recommit the matter to the master. No doubt is entertained of the power of the court in this behalf.⁴

An order confirming a master's report is but an interlocutory one and may be set aside or modified at any time when the interest of justice requires it. In case of a mistake appearing upon the face of the report, but not known at the time the report was confirmed, the court, if the case demands it, will set aside the order and "refer it back to the master that he may review his report."⁵ If, upon the coming in of the master's report, the defendants should move the court to set aside the order of reference, together with the report of the master, and to dismiss the bill for want of equity, and such motion sustained, the order may be as follows:

Order Dismissing Bill.

STATE OF ILLINOIS, } County of Cook. }	ss.	In the Circuit Court of Cook County. October Term thereof, A. D. 1902.
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Aaron M. Hart v. George T. Edwards, John Taylor and Mary E. Taylor.	}	Gen. No. 196,848. Term No. 6,935. In Chancery.
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And now the above cause coming on to be heard on motion of the defendants' solicitor to set aside the order of reference

¹ Fourniquet v. Perkins, 16 How. (U. S.) 82. See also Lang v. Brown, (U. S.) 82, 86; Gibson v. Rees, 50 Ill. 21 Ala. 179, 56 Am. Dec. 244. 383.

² Fourniquet v. Perkins, 16 How. (U. S.) 82, 86. ⁴ Union Sugar Refinery v. Mathieson, 3 Clif. 146, 152, Fed. Cas. 14,398.

⁵ Prentice v. Mensal, 6 Sim. 371.

³ Fourniquet v. Perkins, 16 How.

and the master's report and to dismiss the bill for want of equity, and the court having heard the argument of counsel, both on part of the complainant and defendants, and being fully advised in the premises, doth now order, adjudge and decree that the said motion be, and same is hereby, sustained, and that the order of reference, heretofore entered herein, and the master's report, heretofore filed herein, be and the same are hereby set aside; and it is hereby further ordered, adjudged and decreed that the bill of complaint of complainant be, and the same is hereby, dismissed for want of equity, at the cost of the said complainant.

If, upon hearing of the exceptions to the master's report, the court should become satisfied that the order of reference was improvidently entered, for the reason that there is no equity in complainant's bill, and that the bill, for that reason, should be dismissed by the court of its own motion, an order to that effect may be in the following form:

(Title as above.)

And now the above cause coming on to be heard on exceptions taken by the defendants to the master's report filed herein, and the court having heard argument of counsel, both on part of complainant and defendants, and the court now being more fully advised in the premises, doth find that the order of reference, heretofore entered herein, was erroneously made, for the reason that there was and is no equity in the bill of complaint of the complainant. Therefore the court doth now, of its own motion, order, adjudge and decree that the said order of reference, heretofore entered herein, together with the master's report, made and filed herein, in pursuance thereof, be, and the same are hereby, set aside; and it is further ordered, adjudged and decreed by the court that the bill of complainant be, and the same is hereby, dismissed for want of equity, at the cost of the complainant.

The forms above given, like all others, must be varied and altered to suit the exigencies of the particular case.

§ 518. Confirmation of master's report.—The conditions under which a master's report may be approved are as follows:

First. By consent of parties, expressed in open court, or by filing a written stipulation to that effect.

Second. By failure to file any written exceptions, or to appear and make any objection at the hearing.

Third. By withdrawal of exceptions and failure of exceptant to appear and make any objection at the hearing.

Fourth. The chancellor may sustain a part or all of the exceptions filed, or a part or all of the objections urged at the hearing, modify the report accordingly, and approve it as modified.

Fifth. The chancellor may overrule all exceptions filed, also all objections taken at the hearing, and approve the report as returned by the master.

Under either one of the first three conditions above named, all that is necessary is a simple order approving and confirming the report of the master, though the fact that no exceptions have been filed, or, having been filed, have been withdrawn, may be recited in the order. Such order may be a separate and distinct one, or it may and does generally form simply a clause in the final decree. A case coming under the fifth class above named requires an order reciting, however, the fact that the exceptions have been overruled and the report confirmed, which, like the preceding, may be done by making the order a separate and distinct one, or by embodying it as a clause in the final decree. The essential part of the order is the confirmation of the master's report, which carries with it, by implication, the fact that the exceptions were passed upon and overruled. It is not necessary for exceptions to be formally allowed or disallowed if the record shows that they were acted upon.¹ Lord Cottenham says: "There are two courses which may be taken upon exceptions. One is to allow the exceptions, and refer it back to the master to review his report, which is equivalent to saying: You have done wrong, try again. But when the report is not sent back, but the exception merely allowed, if the court does not make any express declaration of its own, it must be taken to have adopted the proposition of the exceptant; otherwise the question would not be disposed of, for, by the supposition, it is not to go back to the master."²

The converse is also true, that is, where the decree is in favor of an exceptant it necessarily implies that the exceptions were sustained. It follows, therefore, that where the decree is in favor of a party filing exceptions to a master's report the other party cannot be heard to complain of the want of a formal

¹ *Oliver v. Piatt*, 3 How. (U. S.) 333.

² *Stocken v. Dawson*, 2 Phil. Ch. 141; *Cullen v. Dean and Chapter of Kil-laloe*, 2 Ir. Ch. R. 133, 135.

order sustaining such exceptions. The decree is in itself, in effect, a sustaining of the exceptions to the master's report, and the omission to make any formal order sustaining the same is no ground of reversal.¹ This covers cases coming within the fourth division above named, but the better plan in such cases is to make a formal, separate order, specifying just what exceptions are sustained, what modifications and alterations are made, and noting the fact that the report, as modified, is approved.² Upon a hearing by the chancellor, where the report is varied, it is not the practice to make any actual alteration in the report itself, but the matters in which the variance is made should be specified in the order approving the report.³ The confirmation of a commissioner's or master's report, upon a reference to take testimony and report his conclusions thereon, is not such a final order as may be appealed from. Such a report stands in the same relation to a decree that a verdict of a jury does to a judgment.⁴

§ 519. Confirmation of master's report — Continued — Form of order.— A short form of an order of confirmation of a master's report is here given, which, with slight variation, will be found applicable to all cases coming within either the first, second, third and fifth classes mentioned in the last section:

Order Confirming Master's Report.

STATE OF ILLINOIS, } County of Cook. }	ss.	In the Circuit Court of Cook County. To the October term thereof, A. D. 1902.
Aaron M. Hart v. George T. Edwards, John Taylor and Mary E. Taylor.	}	Gen. No. 196,848. Term No. 6,935. In Chancery.

And now the above cause coming on again to be heard on motion of complainant's solicitor to confirm the master's report filed herein, and all the parties having appeared in open court and expressly consented to the confirmation thereof,⁵ it

¹ Anderson v. Henderson, 124 Ill. 164, 174, 16 N. E. 232.

² For form of order in case of this kind, see *ante*, § 515.

³ Fox v. Bearblock, 45 L. T. (N. S.) 469; 17 Ch. D. 429; 46 L. T. (N. S.) 145; Teeter v. St. John, 10 Gr. Ch. 85.

⁴ Kingsbury v. Kingsbury, 20 Mich. 212.

⁵ Or, "and all the parties having by their solicitors filed their written stipulation herein, expressly consenting to the confirmation thereof;" or, "and all the parties having

is therefore ordered, adjudged and decreed that the said report of the master be, and the same is hereby, approved and confirmed.¹

failed to file any written exceptions to said report, and having also failed to appear and make objection to the confirmation thereof;" or, "and the defendants having withdrawn the exceptions heretofore filed by them, and having failed to appear and make any objection to the confirmation thereof;" or, "and the court having heard argument of counsel, both on part of the complainant and all defendants, and the court being fully advised in the premises;" or as the case may be.

¹ In case exceptions are filed and overruled by the court, and the last clause of the preceding note has

been inserted, to cover cases under the fifth class of the preceding section, then, instead of the above conclusion, the order should terminate as follows: "It is therefore ordered, adjudged and decreed that the exceptions to the master's report, heretofore filed by the defendants, be and the same are hereby overruled; and it is further ordered, adjudged and decreed that the report of the master be and the same is hereby approved and confirmed."

For form of order adapted to cases coming within the fourth class of the preceding section, see *ante*, § 515.

CHAPTER VIII.

PROCEEDINGS IN THE UPPER COURT.

I. GENERAL PRINCIPLES.....	§ 520-525
II. THE RECORD—HOW MADE UP—WHAT IS OF RECORD....	526-528
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I. GENERAL PRINCIPLES.

§ 520. General principles — Who has a right to appeal.— The right to have the proceedings of the lower court reviewed by an appellate tribunal is limited to certain persons, and, as this question is an important one, a few suggestions here will not be considered out of place. The first thing to be noted is that the right of appeal is limited to such persons as are parties or privies.¹ Not only must the person be a party or privy, but he must also have an appealable interest, which appealable interest has been defined to be a substantial interest in the controversy — an interest which will be affected by the decision of the court on appeal.² From what has been said it follows that a person may be a party to the suit and still have no right of appeal. Thus where the decree of the lower court gives to a party all that he asks under the pleadings, he can have no right of appeal; in other words, a party who fully succeeds has no right to prosecute the cause further by appealing, as the upper court can give no more than he has already obtained.³ Where, however, only partial relief is granted, a party

¹ *Montgomery v. Leavenworth*, 2 Cal. 57; *Senter v. De Bernal*, 88 Cal. 637, 640; *Bayard v. Lombard*, 9 How. (U. S.) 530; *Payne v. Niles*, 20 How. (U. S.) 219; *In re Hardy*, 35 Minn. 193; *Robinson v. Board*, 87 Ind. 338; *Davis County v. Horn*, 4 Greene (Iowa), 94; *Louisville, E. & St. L. Ry. Co. v. Surwald*, 147 Ill. 194, 85 N. E. 476.

² For a full discussion of this subject, see *Elliott's Appellate Procedure*, secs. 182-186.

³ *Richardson v. Green*, 130 U. S. 104, 9 Sup. Ct. R. 448; *State v. Walters*, 64 Ind. 226; *Beck v. State*, 72 Ind. 250; *Critchell v. Brown*, 72 Ind. 539; *First Nat. Bank v. Essex*, 84 Ind. 144; *Roy v. Rowe*, 90 Ind. 54; *Cain v.*

will be permitted to appeal, because "where partial relief only is adjudged there may be prejudicial error; but where full relief is decreed there can be none, and to permit an appeal by the successful party in such a case would violate fundamental principles and lead to injustice both to the community and to parties."¹ So, too, as a general rule, the acceptance of the benefit of the decree of the lower court cuts off the right of appeal.²

§ 521. Case must be heard upon the record.—Two methods are provided ordinarily for taking a case from a lower court to a higher for review of the proceedings of the former:

First. By appeal, which is prayed for by a party in the court below and granted upon such conditions as are provided by statute, or, in the absence of any statutory conditions, then upon such terms as the court, in its discretion, may specify. In this method of transferring a cause from a lower court to an upper for review, the judges of the latter are not consulted, and have no voice in the matter whatever, until the cause comes up before them on motion, or otherwise.

Second. By a writ of error, issued out of the upper court, upon the application of an aggrieved party, because of error alleged to exist in the proceedings of the lower court, and directing that the record be transmitted to the upper court for review. In this method of transferring a cause the judges of the lower court are not consulted, and have no voice whatever.

In both these cases the record is made up by the clerk of the lower court, and upon the filing of the appeal bond, or writ of error, as the case may be, all power of the judges of the lower court terminates, *eo instanti*, except that of certifying the record of its proceedings. No attempt will be made, in the brief space allotted to this chapter, to go into details of practice, except to state, in a general way, a few principles, most of which are more especially applicable to cases in which the report of a master, or that of a referee, is embodied in the record, and forms an important factor; also, including cases which, because of their character, should have been referred to a master by the lower court, but were not.

Goda, 94 Ind. 555; Walker v. Hill,
111 Ind. 223, 12 N. E. 382.

¹ Elliott's Appellate Procedure,
sec. 147.

² Id., sec. 142.

One of the first and most important things to be remembered, by both court and counsel, is that a reviewing tribunal, while passing upon errors alleged to exist in the record of an inferior one, is not engaged in a retrial of the cause, but is limited solely and absolutely to the errors complained of. For this reason the case must be heard on the actual record as it exists in the court below. On proper application the upper court may permit additional or amended records to be filed, but only for the purpose of making the certified transcript a correct copy of the actual record. A party, on appeal, is never permitted to mend his hold by making another or different case than that in the court below, but "as he made his bed so he must lie."¹ For this reason a party will never be permitted to do in the upper court what he should have done in the lower. If he desires to stand upon a point he must, in proper time and in an appropriate manner, raise and present the question in the court below. A party may consent to the commission of error either expressly, or by his failure to object at the proper time. The maxim of *consensus tollit errorem* is one running through the whole system of remedial jurisprudence.² A party is not permitted to stand by and permit an error to be made without objection and afterward question it.³ The following are given as illustrations:

Where a party goes to trial without issue joined the error is waived and he will not be permitted to urge the objection for the first time in the upper court. Thus, going to trial without a plea, or with a plea unreplied to, is a waiver of the error.⁴ For the same reason where the complainant fails to require an answer to his bill, and proceeds to a hearing without taking the default of the defendant, the upper court will treat the case precisely as if an answer had been filed denying each and every material allegation of the bill, and will not permit the defendant to take any advantage of the irregularity.⁵ An objection, to be available, must be discovered and insisted upon

¹ See this fully discussed, *ante*, §§ 818-828.

² Hughes' *Technology of the Law*, pp. 44-47.

³ *Hollingsworth v. Koon*, 117 Ill. 511, 6 N. E. 148.

⁴ *Corbus v. Teed*, 69 Ill. 205; *Strohm v. Hayes*, 70 Ill. 41; *Jackson v. Sackett*, 146 Ill. 646, 35 N. E. 234.

⁵ *Jackson v. Sackett*, 146 Ill. 646, 35 N. E. 234.

in the court below. Thus, in a suit at law, if the defendant desires to rely on the objection that the judgment exceeds the amount of the *ad damnum* laid in the declaration, the irregularity must be discovered and urged in the court below. It is too late to raise the objection for the first time on appeal.¹ A party is not only required to discover and urge his objection in the court below, but he must urge it in apt time in that court. In a recent Illinois case this rule was applied as follows:

The objection that the appellee had an adequate remedy at law was presented to the court for the first time after appellant had answered the bill upon its merits without making such objection or defense in the answer or otherwise, and after both parties had produced their testimony before the master and each had examined his own witnesses and cross-examined the witnesses of his adversary, and after the master's report and findings upon such testimony had been made up and filed of record in the court. The objection came too late. The relief asked was not so far foreign to equity jurisdiction as that it could not be given in chancery. The appellant had submitted his cause as made by the pleadings to the jurisdiction of the court in equity, and could not be permitted to insist, on the hearing of the report of the master, that appellee should be remitted to another forum for his remedy.²

§ 522. Case must be heard upon the record — Continued.— The following additional illustrations of the rule stated in the last section are given, viz.: that a party who fails to discover and present his objections to the trial court will not be heard to complain on appeal that the court did not find and sustain it. In *Dorn v. Farr*³ the supreme court of Illinois, in applying this rule, say:

"The objections to the report, which were renewed as exceptions on the hearing, were of the most general character, and amounted merely to statements that the material allegations of the bill had not been proven and that the master's re-

¹ *Utter v. Jaffray*, 114 Ill. 470, 2 N. E. 494; *Metropolitan Accident Ass'n v. Froiland*, 161 Ill. 30, 43 N. E. 766, 52 Am. St. 359; *Wheatley, Buck & Co. v. Chicago Trust & S. Bank*, 167 Ill. 480, 47 N. E. 711.

² *Kaufman v. Wiener*, 169 Ill. 596; *Clemmer v. Drivers' Nat. Bank*, 157 Ill. 206; *Harding v. Olson*, 177 Ill. 298, 301, 52 N. E. 482.
³ 179 Ill. 110, 53 N. E. 566.

port should have been in favor of appellant. They did not bring to the attention of the chancellor the objection now urged or call for a ruling upon the question of variance. So far as appears from the record appellant was not aware of the objection, and if he subsequently discovered it he certainly could not be permitted to have a reversal for a reason that never occurred to him at the hearing and was not presented to the chancellor. If he could not discover the objection and present it to the court he cannot complain that the court did not find and sustain it. On the other hand, if a party is aware of an objection he cannot be permitted to conceal it from the court and opposite party for the purpose of an appeal in case of defeat. The objections and exceptions neither called for a ruling from the court on the question now argued nor gave to appellees any clew to its existence."

The rule is that as to all objections to a master's report which must be raised by exceptions, such exceptions must be taken in the court below. They cannot be taken for the first time in the upper court on appeal. The findings of a master cannot be thus attacked for the first time in the appellate court. Where a question of fact is referred, the report as to such question, if not excepted to, is final.¹ This rule is rigidly enforced in Illinois, where it is held that a party will not be permitted to question the correctness of the findings of the master and the action of the trial court where no objections or exceptions were taken in the court below. He will not be allowed to raise objections for the first time in the upper court.²

¹ Kee v. Kee, 2 Gratt. 116; Peters v. Neville, 26 Gratt. 549; Cole v. Cole, 28 Gratt. 365; Simmons v. Simmons, 33 Gratt. 451; Robinson v. Allen, 85 Va. 721, 8 S. E. 835; Gordon v. Lewis, 2 Sumn. 143, Fed. Cas. 5,613; Brockett v. Brockett, 44 U. S. (8 How.) 691, 11 L. Ed. 786; Hudgins v. Kemp, 61 U. S. (20 How.) 45, 54, 15 L. Ed. 856; South Fork Canal Co. v. Gordon, 78 U. S. (6 Wall.) 561, 18 L. Ed. 894; Smalley v. Corliss, 37 Vt. 486; Martin v. Bowker, 19 Vt. 526; Perkins v. Saunders, 2 Hen. & M. 420; Bank of South Carolina v. Rose, 1 Strob. Eq. 257; Price v. Price, 45 S. C. 57, 22 S. E. 790; Ogle v. Adams, 12 W. Va. 281; Kestor v. Lyon, 40 W. Va. 161, 20 S. E. 933; Ward v. Ward, 40 W. Va. 611, 21 S. E. 746, 29 L. R. A. 449, 52 Am. St. 911; Flitner v. Butler, 165 Mass. 119, 42 N. E. 503.

² Gehrke v. Gehrke, 190 Ill. 166, 175, 60 N. E. 59; Reigard v. McNeil, 88 Ill. 401; Hewitt v. Dement, 57 Ill. 500; Hurd v. Goodrich, 59 Ill. 450, 455, 456; Clark v. Laughlin, 62 Ill. 278; Pennell v. Lamar Ins. Co., 73 Ill. 303; Jewel v. Rock River Paper Co., 101 Ill. 57; Brainard v. Hudson, 103

Exceptions to the master's report, taken for the first time when the case reaches the appellate court, come too late. If the findings of the master are wrong, the party desiring to raise the question must appear before the master and file objections to the report, and if they are overruled by the master, the objections disallowed, together with the evidence, must be filed in the lower court, where a hearing can be had before that court, and if disallowed there the decision of that court can be assigned for error on appeal.¹

§ 523. Case must be heard upon the record — Continued. As we have already seen,² the English rule requiring objections to be filed with the master, as a basis of exceptions afterward to be taken on the coming in of the report, is strictly enforced in that state; that is the practice is as follows:

Whenever the party dissatisfied with the findings of fact by the master is of the opinion that the evidence offered before the master was incompetent or insufficient to warrant such finding, he is required, if he seeks to contest the same, to file objections before the master, and, if overruled there, renew them in the form of exceptions in the trial court. In a case where this was not done the supreme court of Illinois say: Had this course been pursued the objection now relied upon might be considered; but as no exception was taken before the master, or in the circuit court, the plaintiff in error is precluded from making the objection here. The master's report must be held conclusive of all questions covered by it not excepted to."³

The rule is well stated in *Singer v. Steele*, 125 Ill. 426, 429, 17 N. E. 751, as follows:

"The practice is, where a party is dissatisfied with the find-

Ill. 218; *Singer v. Steele*, 125 Ill. 426, 17 N. E. 751; *Cheltenham Imp. Co. v. Whitehead*, 128 Ill. 285, 21 N. E. 569; *Whittemore v. Fisher*, 132 Ill. 243, 254, 255, 24 N. E. 636; *Snell v. De Land*, 136 Ill. 533, 537, 27 N. E. 183; *Reedy v. Millizen*, 155 Ill. 636, 40 N. E. 1028; *Continental Loan Society v. Wood*, 168 Ill. 421, 424, 48 N. E. 221; *Marble v. Thomas*, 178 Ill. 540, 53 N. E. 354; *Dolese v. McDougall*, 182 Ill. 486, 55 N. E. 547; *White v. White*, 50 Ill.

App. 149; *Foster v. Van Ostern*, 73 Ill. App. 307, 310; *Lebkeuchner v. Moore*, 88 Ill. App. 16.

¹ *Brainard v. Hudson*, 103 Ill. 218, 221; *Brookman v. Aulger*, 12 Ill. 377; *Reigard v. McNeil*, 38 Ill. 400; *Pennell v. Lamar Ins. Co.*, 73 Ill. 308.

² *Ante*, § 378.

³ *Cheltenham Imp. Co. v. Whitehead*, 128 Ill. 279, 285; *Marble v. Thomas*, 178 Ill. 540.

ing of the master in chancery, he shall make distinct exceptions, so the court can readily understand what matters are at issue between the parties, otherwise it will be understood he acquiesces in the conclusions and findings of the master. According to the well-settled practice, the court in this case first determined, by its interlocutory decree, the rights of the parties, and fixed the basis upon which the account should be taken, and then referred the cause to the master in chancery. On the coming in of his report, if the party was dissatisfied with its conclusions or findings it was his privilege to file exceptions specifically pointing out the errors thought to have been made by the master, which could be readily determined by the court. That was not done by complainants, and they will not now be heard to make objections to the master's report which they did not take and insist upon in the trial court."¹

So, too, in Alabama it is held that, where the decree of the lower court is based on a report of a master, no review of the same can be had on appeal unless proper exceptions to the findings were taken in the court below.² In Wisconsin it is a well-settled rule that, unless exceptions taken before the referee are renewed when the court acts upon his report, they are not available on appeal to the upper court.³ Where an exception is taken and sustained to a master's report, and the matter again referred to the master and no exception is taken to the second report, it is conclusive. The court cannot go back of the last report to consider errors apparent upon the face of the first.⁴ But this rule does not apply where the court upon such re-reference directs the master to do a specific thing, as in such a case no exception is necessary to the second

¹ To the same effect, see *Reigard v. McNeil*, 38 Ill. 401; *Dates v. Winstanley*, 58 Ill. App. 623; *Hewitt v. Dement*, 57 Ill. 500; *Clark v. Laughlin*, 62 Ill. 278; *Brainard v. Hudson*, 103 Ill. 218, 221; *Cheltenham Improvement Co. v. Whitehead*, 128 Ill. 285, 21 N. E. 569; *Reedy v. Millizen*, 155 Ill. 648, 40 N. E. 1028.

² *Bryant v. Stephens*, 58 Ala. 636, 643; *Gerald v. Miller*, 21 Ala. 438, 436; *Taunton & Brooks v. McInnish*, 46 Ala. 619, 624; *Waldrop v. Carnes*,

62 Ala. 374; *Nunn v. Nunn*, 66 Ala. 35, 40; *Davenport v. Bartlett*, 9 Ala. 179; *National Com. Bank v. McDonnell*, 92 Ala. 387, 9 So. 149; *Bellinger v. Lehman*, 103 Ala. 385, 15 So. 600.

³ *Crocker v. Currier*, 65 Wis. 662, 27 N. W. 825; *McDonnell v. Schricker*, 44 Wis. 327; *Gilbank v. Stephenson*, 30 Wis. 155.

⁴ *Shenandoah Valley Nat. Bank v. Shirley*, 26 W. Va. 563.

report.¹ If as a matter of fact no objections are filed with the master to the draft report it does not help the matter for the court to enter an order that the objections stand as exceptions, and, in such case, where no objections to the report were filed in the master's office, it is sufficient ground for the upper court to affirm the decree, notwithstanding the chancellor entered an order "that the objections before the master stand as exceptions to the report," as there is nothing to which such order could apply.²

§ 524. Case must be heard upon the record — Continued. The gist of the whole matter is that a point not raised before a master, or passed upon by him, or raised by any exception to his report, cannot be considered by the court in passing on such report.³ To justify the upper court in passing upon any objections to the findings of the master, or the action of the lower court in entering a decree upon the same, it must appear that the objections urged were brought before the lower court by exceptions to the master's report. It is a general rule of practice that no point, arising on the pleadings or evidence in an appellate court, shall be made which was not brought to the notice of the inferior court.⁴ If the master goes beyond the order of reference, or if his conclusions involve a misconception of agreements, contracts or the evidence, the dissatisfied party must bring the matter to the attention of the lower court by exceptions to the report, and having failed to do this he cannot in the appellate court, for the first time, object that the master proceeded upon erroneous views relative to such matters.⁵

The same rule forbidding the upper court from passing upon any question upon a master's findings except those presented by exceptions requires court and counsel to rigidly adhere to the exception as taken; in other words, the exception as taken cannot be altered, amended, modified, enlarged, or presented in any other light than that presented to the court below.⁶ On

¹ See *ante*, § 464.

² *Lebkeuchner v. Moore*, 88 Ill. App. 16.

³ *Armstrong v. Austin*, 45 S. C. 69, 23 S. E. 763, 29 L. R. A. 772.

⁴ *Brockett v. Brockett*, 3 How. (U.S.) 691, L. Ed., Book 34, p. 786.

⁵ *Burns v. Rosenstein*, 135 U. S. 449, L. Ed., Book 34, pp. 193, 195, and cases cited.

⁶ This subject was fully discussed in a previous chapter. See *ante*, §§ 313-323.

exceptions to a master's report a court of appeal has no power to determine the question whether or not there should have been an order of reference. The only matter that can be considered is whether or not the chancellor erred in his rulings on the exceptions to the findings of the master.¹ After an order of reference is made in a cause, the only method of questioning its propriety is by an appropriate motion. Such an order cannot be attacked by exceptions to the master's report.² A party having failed to move to modify, alter or set aside such order in the lower court, but, instead thereof, electing to stand by his exceptions, is estopped from raising the question in the upper court. This court can only pass on the propriety of the ruling of the lower court upon the question as the party chose to present it.

§ 525. Case must be heard upon the record — Continued. This rule, however, like all others, must not be extended to cases beyond its legitimate sphere. For example, all objections which may be urged in the court below, without filing exceptions, may likewise be insisted upon in the upper court, such as errors appearing upon the face of the report, errors as to conclusions of law, and those of like character. Ordinarily it is the duty of a party desiring to question the correctness of a master's report to object to the same on the coming in of the report; but when the report on its face shows that it is based on a wrong principle — is erroneous, — a neglect to do so does not prevent him from having the report, and the decree entered upon it, reviewed in the appellate court, any more than would a default preclude him in case of a decree *pro confesso*. When it appears from the record that an improper decree has been rendered it will be reversed, although objections may not have been interposed on the coming in of the master's report.³ On appeal no inquiry can be had as to the correctness of the master's findings of fact unless exceptions were properly taken in the court below, but the master's mistaken apprehension of the legal consequences of the facts reported, as Daniell states it, may be opened upon further directions without exceptions.⁴

¹ National Bank of the Metropolis v. Sprague, 23 N. J. Eq. 81, 82.

² See *ante*, § 463.

³ Strang v. Allen, 44 Ill. 428, 434.

⁴ Burke v. Davis, 58 U. S. App. 414, 420, 81 Fed. 907, citing Daniell's Ch.

So, too, the parties themselves may abandon exceptions filed in the lower court and try the case upon a wholly different theory, in which case the upper court will pay no attention to the exceptions. For example, where a cause is referred to a master, a report made and returned into court and exceptions filed thereto, but both parties proceed to a hearing without calling up the report or the exceptions thereto, and a decree is entered without reference to the report and without any disposal of the exceptions to the report, and no exception is taken to the action of the chancellor in thus disregarding the report, the irregularity will be considered as waived.¹ Although a matter may not be in issue under the pleadings, yet, if both parties treat it as in issue and procure the master to pass thereon, they will not be heard for the first time to raise the objection in the upper court.²

Again, a party who has not excepted will not be permitted to avail himself of the exceptions of another party. Thus, in Michigan it is the settled rule that, on an appeal from an accounting, the appellant's objections only will be considered.³ It is there said that the only instance in which this rule is departed from is when a restating of the account requires that, because of such different method of computation, an apparent error should be corrected; but, as to the item in question, the circuit judge's finding, not having been excepted to, is conclusive.⁴ Another exception is where two or more parties are interested in the distribution of a fund, and, on exceptions taken by one, such fund is increased, the other parties interested will be entitled to their proportion of the increase, although they filed no exceptions, and apparently acquiesced in the master's finding.⁵ So, too, where the decree is materially contrariant to the report and shows on its face material error as to matters of law prejudicial to the appellant, it will be reversed, even though no exceptions were filed in the court below.⁶

Pr. 1310; *Hayes v. Hammond*, 162 Ill. 183, 44 N. E. 422.

¹ *Hall v. Hall* (Tenn. Ct. of Ch. Appeals), 39 S. W. 535.

² *Gehrke v. Gehrke*, 190 Ill. 166, 175, 60 N. E. 59; *Thornton v. Commonwealth Loan Ass'n*, 181 Ill. 456, 54 N. E. 1037.

³ *Ryan v. Brown*, 18 Mich. 212, 100

Am. Dec. 154; *Bundy v. Youmans*, 44 Mich. 376, 6 N. W. 851; *Sweeney v. Neely*, 53 Mich. 421, 19 N. W. 127.

⁴ *Cutcheon v. Corbitt*, 99 Mich. 584, 59 N. W. 147.

⁵ See *ante*, ch. VII, § 434.

⁶ 2 Barton, Ch. Pr. 648, and cases cited.

II. THE RECORD — HOW MADE UP — WHAT IS OF RECORD.

§ 526. **The record — How made up.**— The fact that the case in the upper court must be confined absolutely to a review of the proceedings of the court below, in other words, must be heard upon the record as made in the lower court, requires great care in —

First. The proper preparation and presentation of every matter pertaining to rights of the parties in the court below, including the saving, at the proper time and in the proper manner, of every necessary objection and exception. This includes, in cases of appeal, a careful compliance with the conditions upon which the appeal is granted.

Second. The making up of a correct transcript of the record and proceedings of the lower court, the assignment of errors thereon, the filing of the same in due time, and, finally, a due and proper observance of all the rules and regulations governing the making and filing of abstracts and briefs, and a proper presentation of the cause for hearing.

In the preceding pages we have fully treated every subject connected with the hearing of a cause in the court below, having started with the filing of the bill and followed the cause, step by step, to the master's office, through the master's office back to the chancellor again, and thus on to the final decree. It only remains now for us to offer some suggestions relative to the hearing of the cause in the upper court; but it is with regret that we are compelled to abandon the method heretofore followed, and content ourselves, as stated in a previous section, with some suggestions necessarily very general in their character. It is said that at least forty per cent. of the cases reversed in the upper courts owe their reversal to some defect in this regard, that is, are not reversed upon their merits, but on account of some error in practice, either in the proceedings in the court below, or in the presentation of the case in the upper court. This is, in some cases, excusable, counsel often being unable to foresee and provide for every possible contingency which may arise in the progress of a cause; yet we are compelled to admit that the majority of such miscarriages of justice owe their origin either to sheer ignorance of, or inattention to, the plainest and simplest rules of practice; and,

when one observes the loose, slipshod method in which so many cases are tried, and their manner of presentation in the upper court, the wonder is that the judges of the latter are able to dispose of as many cases upon their merits as they do.¹

As the case must be heard solely upon the record as it exists in the court below, it follows that the record must be tried by itself and by itself alone.² To permit any other course would be to confer original jurisdiction upon the upper court by permitting it to pass upon another and different case than that heard in the court below. For this reason the parties will not be permitted by stipulation or consent to change the record by showing a different state of facts than that acted upon by the court below.³ Yet this rule does not prevent the parties from remedying certain defects in a transcript by agreement. There is a difference between creating a record by stipulation and supplying a defect in a transcript to make it correspond with the record as it actually exists.⁴ Every attorney should try his case as if he were assured it would finally go to the court of last resort, and thus constantly keep an eye on the record, in other words, he should be conscious at every moment that he is *then* engaged in making the record, and act accordingly; or, as Judge Gary of the Illinois appellate court, quaintly expressed it: "It has been said that the best time to contest an election is before the polls close, so it may be said that the best time to correct a record is when it is made."⁵

A record in judicial proceedings has been defined to be "a precise history of the suit from its commencement to its termi-

¹ As to this subject, see the comments of Judge Jackson of the supreme court of Georgia, *post*, § 539.

² *Mutual Building & Loan Ass'n v. Tascott*, 143 Ill. 305, 32 N. E. 876; *Hauger v. Gage*, 168 Ill. 865, 48 N. E. 142.

³ *Harding v. Brophy*, 133 Ill. 39, 24 N. E. 558; *Lane v. Dorman*, 8 Scam. (Ill.) 238, 36 Am. Dec. 543; *Troy Laundry Machinery Co. v. Kelling*, 157 Ill. 495, 42 N. E. 58; *S. P., Baltimore & Ohio R. R. Co. v. Gaulter*, 60 Ill. App. 647; *State v. Burns*, 14 Mo. App. 581; *Whitman v. Weller*, 39 Ind.

515; *Board v. Newman*, 85 Ind. 10; *Spangler v. San Francisco*, 84 Cal. 12, 23 Pac. 1091, 18 Am. St. 158. See Elliott's Appellate Procedure, sec. 187, and other cases cited in note 8.

⁴ *Glenn v. Fant*, 134 U. S. 398, 10 Sup. Ct. R. 583; *Harding v. Brophy*, 133 Ill. 39, 24 N. E. 558; *Hill v. First Nat. Bank*, 42 Kans. 364, 22 Pac. 1; *Philadelphia, etc. Co. v. Shipley*, 72 Md. 88, 19 Atl. 1. See Elliott's Appellate Procedure, secs. 188-190.

⁵ *Scott v. Schnadt*, 67 Ill. App. 545.

nation, including the conclusion of the law thereon, drawn up by the proper officer, for the purpose of perpetuating the exact state of facts."¹ The "record" is the judicial history of the case as it is preserved in the court below, while the "transcript" is a properly authenticated copy of that judicial history, although the terms are frequently used interchangeably; yet, after all, it is not an improper use of the word "record," when speaking of the "transcript," as the latter becomes a part of the record in the upper court the moment it is filed. The Illinois supreme court rules call this document "the authenticated copy of the record,"² "the transcript of the record,"³ and "the record."⁴ As a rule original papers are not taken from the office of the clerk of the lower court to that of the upper court, but special rules provide for their transfer in cases where their inspection becomes necessary.⁵ Ordinarily the distinction between the transcript and the record is unimportant, yet, in determining the power of amendment, it is important that the distinction should be kept in mind. The power to amend the record is vested solely in the lower court, while the power to amend the transcript belongs exclusively to the upper court. Omissions in the transcript may, by leave of court, be supplied, while defects in the record must, if they can be corrected at all, be remedied by application to the lower court.

§ 527. What is of record.— In chancery proceedings as at law, it is important to distinguish between matters which are of record and those which are not, as those not of record, if material, should be made so.

In a chancery proceeding the following matters are of record:

First. The bill, answer, replication, pleas, demurrers—in short, all the pleadings, including all exhibits and papers filed in a cause as a part thereof,—are a part of the record without being embodied in a certificate of evidence.⁶ Exhibits when made a part of a bill or answer form a part of the record.⁷

¹ Davidson v. Murphy, 18 Conn. 218. v. Macy, 76 Iowa, 816, 41 N. W. 28; Mitchell v. Stinson, 80 Ind. 324.

² Rule No. 1.

³ Rule No. 2.

⁴ Rule No. 10.

⁵ See Illinois Supreme Court Rule No. 12; Holbrook v. Nichol, 40 Ill. 75; Cameron v. Savage, 40 Ill. 76; Sutphen v. Cushman, 40 Ill. 77; Cox v. Larkin, 41 Ill. 413; Stevison v. Earnest, 80 Ill. 518; Van Cott v. Sprague, 5 Ill. App. 99.

⁶ Dilworth v. Curts, 139 Ill. 508, 29 N. E. 861; Baldwin v. McClelland, 152 Ill. 42, 51, 38 N. E. 143; Harding v. Larkin, 41 Ill. 413; Stevison v. Earnest, 80 Ill. 518; Van Cott v. Sprague, 5 Ill. App. 99.

⁷ Bressler v. McCune, 56 Ill. 475;

Second. All motions made in a chancery proceeding, together with all rulings of the court made thereon, are a part of the record.¹

All such motions in a chancery cause should be, and are supposed to be, noted upon the clerk's docket and a minute thereof made by the judge himself, and the motions, together with the orders made thereon, should be duly entered of record by the clerk in making up his orders in the case. By this means they become a matter of record, without the aid of a judge's certificate or bill of exceptions, as is required in a case at law.²

Third. The master's report, including the evidence duly certified and returned by him, together with all schedules and exhibits accompanying his report, are matters of record in a chancery cause without any certificate of the court embodying the same and declaring it to be a part of the record, but counsel must be careful to have the record show, either by the certificate attached to the master's report, or otherwise, that no other evidence was heard.³

In the case cited in support of this proposition the supreme court of Illinois say: "Undoubtedly the rule is that all depositions on file in the cause, and the master's report of evidence, become a part of the record in a chancery cause, without any certificate of the court declaring them to be a part of the record. Under that rule the evidence reported by the master in this cause may be considered as a part of the record, notwithstanding there is no certificate of the court to that effect. The practice in such matters is well understood, but the difficulty is it does not appear, from anything in this record, that the master's report contains all the evidence heard, either by the master or the court. Neither the court nor the master certifies that it does." For this, and other reasons, the court affirmed the decree of the court below.⁴

So, too, the supreme court of Georgia, speaking of the same

Brooks v. Martin, 64 Ill. 339; Moss v. McCall, 75 Ill. 190; White v. Morrison, 11 Ill. 361; Cooley v. Scarlet, 38 Ill. 316, 87 Am. Dec. 298.

¹ Flaherty v. McCormick, 123 Ill. 525, 532, 14 N. E. 846; Ames v. Stockhoff, 73 Ill. App. 427; Colehour v. Roby, 88 Ill. App. 478.

² Flaherty v. McCormick, 123 Ill. 525, 532, 14 N. E. 846.

³ Groenendyke v. Coffeen, 109 Ill. 325, 335.

⁴ See in support of this same rule, Brown v. Miner, 123 Ill. 148, 156, 21 N. E. 228, citing Hannas v. Hannas, 110 Ill. 53; Sheen v. Hogan, 86 Ill. 16;

subject, say that evidence taken by a master and duly reported by him to the court appointing him is a part of the record, and when specified in the bill of exceptions as material, is properly brought to the supreme court. In such case the master's report of the evidence is no less a part of the record than is the rest of the report, and the whole report should and does come up in the transcript. It follows that none of the evidence need be incorporated or referred to in the bill of exceptions;¹ but it is said that a referee's report is no part of the record, unless made so by a bill of exceptions or a certificate of evidence;² and in Indiana it is held that the report of a master commissioner is no part of the record unless made so by the bill of exceptions.³ In that state it was also held that exceptions to the report of the master form no part of the record unless made so by a proper bill of exceptions.⁴

Fourth. All depositions taken and filed in a chancery cause form a part of the record and will be considered by the upper court without a certificate of evidence.⁵

§ 528. What is not of record — Certificate of evidence.— As above stated, many matters taken into consideration by the lower court during the progress of a hearing are not of record unless made so by a certificate of evidence. In all cases where such matters so considered are material and necessary to be

Davis v. American and Foreign Christian Union, 100 Ill. 818; Morgan v. Corlies, 81 Ill. 72; McIntosh v. Saunders, 68 Ill. 128; Rhoades v. Rhoades, 88 Ill. 139; Walker v. Carey, 53 Ill. 470; Allen v. Le Moyne, 102 Ill. 25; Mauck v. Mauck, 54 Ill. 281; Walker v. Abt, 83 Ill. 226; Corbus v. Teed, 69 Ill. 205. See also White v. Morrison, 11 Ill. 361; Stacey v. Randall, 17 Ill. 467; Bennett v. Whitman, 22 Ill. 448; James v. Bushnell, 28 Ill. 158; Waugh v. Robbins, 83 Ill. 181; Quigley v. Roberts, 44 Ill. 503; Wilhite v. Pearce, 47 Ill. 413; Driscoll v. Taunock, 76 Ill. 154; Marvin v. Collins, 98 Ill. 510; Moss v. McCall, 75 Ill. 190; Thomas v. Adams, 59 Ill. 223; Ferris v. McClure, 40 Ill. 99; Smith v. Newland, 40 Ill. 100; Jackson v. Sackett, 146 Ill. 646.

¹ Arendale v. Smith, 107 Ga. 494, 495, 83 S. E. 669; Green v. Coast Line R. R. Co., 97 Ga. 15, 24 S. E. 814.

² Osborn v. Graves, 11 Oreg. 526, 6 Pac. 227.

³ King v. Marsh, 37 Ind. 389; Stanton v. The State, 82 Ind. 463, 469.

⁴ Hauser v. Roth, 37 Ind. 89, 95; Lewis v. Godman, 129 Ind. 359, 361, 27 N. E. 563; Stanton v. The State, 82 Ind. 463, 469.

⁵ Smith v. Newland, 40 Ill. 100, 102; Bressler v. McCune, 56 Ill. 475, 481; Moss v. McCall, 75 Ill. 195; Ryan v. Sanford, 133 Ill. 291, 298, 24 N. E. 428; Groenendyke v. Coffeen, 109 Ill. 325, 335; Jackson v. Sackett, 146 Ill. 646, 655, 35 N. E. 234; Ferris v. McClure, 40 Ill. 99; Heacock v. Hosmer, 109 Ill. 245.

considered in passing upon the issues raised in the upper court, they must be thus preserved. Among such matters may be mentioned the following:

First. All evidence introduced upon the hearing other than that certified by the master with his report. This includes:

(a) Oral testimony, which, as has already been shown, may be introduced upon the hearing, notwithstanding the cause has been referred and evidence taken and returned by the master. No additional authorities are necessary to support the statement that, without the evidence, it is impossible for the upper court to determine whether the lower court erred in passing upon the exceptions to the master's findings of fact.¹

(b) All documentary evidence introduced upon such hearing must be thus preserved, and for the same reasons.²

Second. All evidence of every nature and kind, including all affidavits read before a chancellor upon a motion, form no part of the record and will not be considered by the upper court unless made of record by a certificate of evidence.³

We thus see that in chancery proceedings, as already stated, that some matters are "of record" and others, though equally material and of equal importance in determining the issues, are not; though every material matter pertaining to the cause, if not already of record, may be made so by any party having an interest therein. At law this is done by a bill of exceptions, but in chancery cases by a certificate of evidence, as, strictly speaking, such a thing as a bill of exceptions is unknown in that court.⁴ The sole office of a certificate of evidence in a chancery case is to preserve evidence either offered or admitted upon the hearing of the main issues, or some motion made in the case.⁵ It is necessarily limited to such evidence as is not already of record, such as oral evidence, affidavits, and documentary evidence generally.⁶ In making up the certificate of evidence it is not necessary to incorporate

¹ *Ante*, §§ 418, 471, 472.

² *Jackson v. Sackett*, 146 Ill. 646, 655, 85 N. E. 234.

³ *Roberts v. Fahs*, 36 Ill. 268; *Van Pelt v. Dunsford*, 58 Ill. 145; *Brockenbrough v. Dresser*, 67 Ill. 225; *Heacock v. Hosmer*, 109 Ill. 245, 248.

⁴ *Ferris v. McClure*, 40 Ill. 99; *Smith*

v. Newland, 40 Ill. 100; *Flaherty v. McCormick*, 123 Ill. 525, 583, 14 N. E. 846.

⁵ *Hand v. Waddell*, 167 Ill. 402, 47 N. E. 772.

⁶ *Flaherty v. McCormick*, 123 Ill. 525, 14 N. E. 846; *Ames v. Stockoff*, 78 Ill. App. 427; *Colehour v. Roby*, 88 Ill. App. 478.

exhibits in the body of the instrument, but they may be attached thereto with proper references to make their identification certain;¹ or they may be simply referred to in the certificate, in such a way as to identify them, with a request to the clerk to insert them in making up the transcript.²

The certificate of evidence may be in the following form, varied, however, to suit the circumstances of the case:

Certificate of Evidence.

STATE OF ILLINOIS, } County of Cook. }	ss. In the Circuit Court of Cook County. To the October Term thereof, A. D. 1902.
John L. Warner v. Henry M. McVey and Mary J. McVey. }	Gen. No. 203,404. Term No. 4,322. In Chancery.

Be it remembered, and certified, that on the hearing of this cause, at the above term of court, upon the bill of complaint, answer to said bill, and the replication thereto, and on the report of Wm. Fenimore Cooper, one of the masters in chancery of this court, to whom this cause was referred to take and report the evidence, together with his conclusions thereon, and also upon the evidence returned by said master with his report, together with the schedules and exhibits accompanying the same, the defendants [*or complainant, as the case may be*] introduced the following parol testimony, to wit:

To maintain the issues on his part, the complainant introduced in evidence on his behalf, as follows, that is to say: George S. Brown, a witness produced on his part, testified as follows: [*Here insert his testimony.*] And the complainant further offered in evidence *one trust deed and four promissory notes* in words and figures as follows: [*Here copy.*]

And further, Albert T. Barnes, a witness on the part of the defendants, testified as follows: [*Here insert his testimony in full.*] And further the defendants offered in evidence a certain *deed* in words and figures, as follows, to wit: [*Here insert copy.*]

Be it further remembered, and certified, that on the motion made by the defendants to re-refer the said cause to the master for the purpose of allowing the defendants to introduce further evidence, the defendants introduced in evidence two affidavits, which affidavits are in words and figures as follows: [*Here copy.*]

Be it further remembered, and certified, that the foregoing

¹ Legnard v. Rhoades, 156 Ill. 431, 40 N. E. 964.

² Hand v. Waddell, 167 Ill. 402, 47 N. E. 772.

was all the evidence introduced on the hearing of said cause, or upon said motion.

And, inasmuch as the matters above set forth do not fully appear of record in said cause, the defendants tender this certificate of evidence, and pray that the same may be certified under the hand and seal of the judge of this court, and thereby made a part of the record in said cause, and it is certified accordingly.

Dated this October 26, A. D. 1902.

R. W. CLIFFORD, Judge. [L. S.]

III. THE TRANSCRIPT.

§ 529. The transcript — What it must contain.— in practice a transcript of the record, or so much thereof as is necessary to enable the court to understand and pass upon the contested questions, duly certified by the clerk, is transmitted to the upper court, though, in contemplation of law, it is the record itself that is thus returned.¹ The transcript differs from the record in this: the record is the judicial history of the cause which remains in the custody of the court that made it, while the transcript, as the name imports, is a duly certified copy of the record, or so much thereof as may be material to the issues involved in the appeal. The transcript is made upon the order of the solicitor of the party taking the case to the upper court. A *præcipe* is a direction to an officer to perform an official act in a certain manner. A *præcipe* for a record, or, more properly speaking, a transcript, is therefore simply a direction to the clerk in writing, telling him that a transcript of the record is desired in a certain case, and what part of the record is to be copied into such transcript.² A rule of court or statute usually provides that the attorney for the appellant, or plaintiff in error, may direct the clerk as to what parts of the record shall be inserted in the transcript. For example, a rule of the Illinois supreme court provides as follows:

“In civil cases a party or his attorney may, by *præcipe*, direct what files of the cause shall be included in the transcript, and if the transcript shall be insufficient to fully and fairly present the questions involved, the requisite portion shall be supplied at his cost, and if unnecessarily voluminous, he shall

¹ Rochester v. Roberts, 25 N. H. 506. ² Miller v. Whittaker, 33 Ill. 386.

pay the cost of unnecessary matter." In Indiana a similar provision exists by statute.¹

This transcript is obtained from the clerk of the court upon the written order of the solicitor for the appellant or plaintiff in error, as the case may be, who usually gives specific directions as to what papers and what parts of the record he desires to be copied into the transcript. It frequently is a nice question to determine what parts and how much of the record is necessary to be embodied in the transcript. On the one hand counsel must guard against the error of omitting some necessary matter and consequent failure to secure a decision of his case upon its merits, and, on the other hand, that of stuffing his transcript with unnecessary matter at the cost of his client, and the additional risk of being censured by the court. These directions of counsel should be followed by the clerk and be appended to the transcript to enable the upper court to intelligently pass upon the question of costs for incumbering the record unnecessarily.² The average lawyer, acting under the impression that, in taking a case to the upper court, it is his duty to preserve and present everything that took place in the trial court, has everything copied into his transcript, whether material to the questions to be passed upon in the upper court or not. Such a course unnecessarily incumbers the record, causes needless expense to the client, and is, for these reasons, condemned by the courts.³ Under such a statute or rule of court the attorney for the appellant may direct what part of the record shall be included in the transcript, and it is the duty of the clerk to obey his instructions, the responsibility resting upon the attorney and not upon the clerk if the record is insufficient.⁴ In Illinois it was held by the appellate court, first district, that this rule was intended to aid the clerk in making a complete record, and not as dispensing with the requirements of a complete record.⁵ If there is no *præcipe* filed directing the clerk what parts of the record are to be inserted, it is his duty to make a complete transcript of the whole record.⁶

¹ Elliott, Appellate Procedure, secs. 198, 200.

⁴ Allen v. Gavin, 130 Ind. 190, 29 N. E. 368.

² Miles v. Buchanan, 86 Ind. 490.

⁵ North v. Alles, 50 Ill. App. 266.

³ Harvey v. Van De Mark, 71 Ill.

⁶ Reid v. Houston, 49 Ind. 181;

17; Freedland v. McNeil, 83 Mich. 41. Watt v. Alvord, 27 Ind. 495.

§ 530. What it must contain — Form of.— The *præcipe* for a transcript of the record may be as follows:

Præcipe for Record.

STATE OF ILLINOIS, County of Cook.	}	ss.	In the Circuit Court of Cook County.
			To the October Term thereof, A. D. 1902.

John L. Warner	}	Gen. No. 203,404.
v.		Term No. 4,322.
Henry M. McVey and		In Chancery.
Mary J. McVey.		

The clerk of the above court will please prepare a transcript of the record for the appellate court in the above entitled cause, and is hereby directed to insert therein the following:

1. The placita.
2. The summons and the return thereon.
3. The pleadings.
4. The order of the court overruling the demurrer of the defendants to complainant's bill.
5. The order of reference to the master.
6. The master's report, together with the evidence, schedules and exhibits returned therewith.
7. The objections of the defendants to the master's draft report.
8. The motion on part of the defendants to re-refer the cause to the master.
9. The certificate of evidence containing affidavits read in support of said motion.
10. The order of court overruling said motion.
11. The defendants' exceptions to the master's report.
12. The order of court overruling said exceptions.
13. The final decree, including prayer for appeal and order granting the same.
14. The appeal bond and approval of same.

Dated this 26th day of October, A. D. 1902.

JOHN T. JONES,
Solicitor for Defendants.¹

The following may be used as the form of a *præcipe* for a transcript of the record in a case taken from the circuit court to the United States circuit court of appeals, the necessary changes being made:

¹ This form must be varied to suit the circumstances of the case.

Præcipe for Record.

UNITED STATES CIRCUIT COURT,
Northern District of Illinois,
Northern Division.

Joshua C. Sanders	}	Bill.
v. Village of Riverside.		
		No. 21,878.
Village of Riverside	}	Cross-bill.
v. Joshua C. Sanders.		

To the Clerk of the above-entitled Court:

You will please prepare transcript of the record in this cause to be filed in the office of the clerk of the United States circuit court of appeals for the seventh judicial circuit, under the appeal heretofore perfected to said court by cross-complainant, and include therein the following pleadings, proceedings and papers on file:

1. Petition for appeal of cross-complainant.
2. Assignment of errors of cross-complainant.
3. Order allowing appeal of cross-complainant.
4. Bond of cross-complainant on appeal.
5. Citation.

AMOS C. MILLER,
Solicitor for Cross-complainant.

§ 531. What it must contain — Continued.— It is perfectly competent for the parties to stipulate what parts of the record shall be included by the clerk in the transcript, which stipulation (the necessary changes being made to suit the facts of the particular case) may be as follows:

		<i>Stipulation.</i>
Joshua C. Sanders	}	Amended Bill.
v. Village of Riverside.		
		No. 21,878.
Village of Riverside	}	Cross-bill
v. Joshua C. Sanders.		

It is hereby stipulated by and between the above-mentioned parties by their respective counsel, that the clerk of the circuit court, in preparing the transcript of record herein for use in the circuit court of appeals upon the appeals taken herein by the complainant in the original bill and the complainant in the cross-bill, may use one copy of the record for both appeals.

And it is further stipulated that the said clerk in preparing said record may use the copy of the printed record, used upon the hearing of said cause in the circuit court; and that the clerk shall insert in the transcript the following, which are hereby conceded to be all the papers, documents and record of proceedings in the circuit court, which are necessary to a full understanding of the questions raised upon the two appeals in this cause, namely:

1. The date when the original suit was commenced.
2. The printed record used in the circuit court, omitting the several headings to the different parts of such record but showing the date when the different depositions were taken, and also showing the date when the said printed record was filed in the United States circuit court.
3. The written opinion of Judge Grosscup filed in this cause on the 20th of January, 1896.
4. The written opinion of Judge Kohlsaas filed in this cause October 21, 1901.
5. The report of E. B. Sherman, the master in chancery to whom this cause was referred, filed herein October 2, 1900, with the exceptions filed thereto by the complainant, Joshua C. Sanders.
6. The assignment of errors, petition for appeal and appeal bond filed herein by the complainant Sanders.
7. The assignment of errors, the petition for appeal and appeal bond filed herein by the Village of Riverside, the complainant in the cross-bill.
8. A transcript of all the orders entered in this cause from the commencement of the suit up to the present time, including the allowance of the respective appeals taken herein, and the order entered November 14, 1901, with reference to the transmission of original documents for inspection by said circuit court of appeals.
9. In addition to and as a part of the record, the clerk of the circuit court shall transmit with the record the original documents referred to in the order of the court entered herein November 14, 1901, in pursuance of the directions of such order.
10. Order of the circuit court of Cook county striking from the docket with leave to reinstate case number 4608, Town of Riverside et al. v. Louis Sapicha et al.
11. Copy of original bill of complaint in above case marked on outside of wrapper Exhibit C and Exhibit D.
12. Citation on appeal in Sanders v. Village of Riverside and citation on cross-appeal in the same case.
13. Amendment to cross-bill of Village of Riverside.
Dated November 30, 1901.

JOHN L. PEARSON,
Solicitor for Complainant in Original Bill.
AMOS C. MILLER,
Solicitor for Village of Riverside.

§ 532. What it must contain — Continued.— Some suggestions are here added as to the important or essential parts of a transcript. There are some things that every transcript must contain. For example, every transcript must show:

First. That the court had jurisdiction of the subject-matter.

Second. Jurisdiction of the person of the defendant.

Third. The determination of the cause by the court.¹

Jurisdiction of the subject-matter is shown by the placita and the pleadings. The placita shows the court and the pleadings show the matter litigated. These facts being shown the question of jurisdiction of the subject-matter becomes purely a question of law. Jurisdiction of the person is shown by the process and the return thereon, or by its equivalent,— the voluntary appearance of the defendant. The final determination of the cause is shown by the final order, judgment or decree.² What else must be shown by the transcript depends upon the questions involved in the appeal, but, with the view of throwing some light upon what is required to be shown in each particular case, the following directions are given more in detail. A transcript should consist, when complete and ready for filing, of the following:

First. The placita.

Without a placita there is nothing to show that there was a court properly organized by which a lawful judgment could be rendered, and, in such a case, the judgment must be reversed.³

Second. The process and return on the same, or its equivalent, the voluntary appearance of the defendant.

The voluntary appearance of the defendant is shown either by a formal entry of his appearance in writing, or by appearing and taking some step in the cause. Jurisdiction of the person of the defendant must be shown by some one of these methods.⁴

Third. The transcript must embrace a complete copy of the pleadings.⁵

¹ Baldwin v. McClelland, 152 Ill. 42, 52, 38 N. E. 148.

² Id.

³ Chicago v. Brennan, 61 Ill. App. 247. See Stubbings v. City of Evanston, 156 Ill. 338, 40 N. E. 966.

⁴ Baldwin v. McClelland, 152 Ill. 42, 52, 38 N. E. 148.

⁵ Collins v. U. S. Express Co. 27 Ind. 11; Sumner v. Goings, 74 Ind. 293; McCardle v. McGinley, 86 Ind. 538, 44 Am. R. 843; Seager v. Aughe, 97 Ind. 285.

Appellant must, at all events, show by the transcript the state of the case upon the pleadings, and, if he fails to do so, the appeal must be dismissed, or the judgment affirmed;¹ otherwise it will be impossible for the upper court to determine what the issues were, and whether or not any error has been committed by the court below. In a chancery proceeding this includes copies of the bill, answer, replication, demurrers, pleas and other pleadings.²

Fourth. The order of reference to the master. If the motion to refer was resisted and affidavits admitted they should be made of record by being included in the certificate of evidence copied in the transcript.

Fifth. A copy of the master's report, together with all schedules, exhibits, and all evidence returned with such report, as we have seen, are a part of the record and must be embodied in the transcript, if the appeal involves the correctness of the master's findings of fact or the approval of the report by the chancellor.

The report of the master, being a part of the record, is simply copied into the transcript by the clerk. In no case should the original report be embodied in the transcript.³ The practice of sending up original files and papers cannot be tolerated. It can only be done when authorized by statute, or when an inspection of the original is necessary to a proper understanding of the same. An Illinois statute authorizes the clerk to embody the original bill of exceptions or certificate of evidence in the transcript by stipulation of parties. It is held that such stipulation must appear in the bill of exceptions or elsewhere in the transcript.⁴ The clerk's certificate that it was so incorporated by agreement is sufficient.⁵

§ 533. What it must contain — Continued.— The evidence taken by the master forms a part of the record, but whether it must be embodied in the transcript taken to the upper court depends upon the questions presented by exceptions, or other-

¹ *Road District v. Miller*, 156 Ill. 221, 40 N. E. 447. 824; *Burkam v. McElfresh*, 88 Ind. 233; *Baldwin v. McClelland*, 153 Ill.

² *Steamboat Zephyr v. Brown*, 2 Wash. Ter. 44; *Dimick v. Campbell*, 42, 52, 38 N. E. 143.

81 Cal. 238; *Morris v. Angle*, 42 Cal. 236, 240; *Douglas v. Dakin*, 46 Cal. 49, 52; *Mitchell v. Stinson*, 80 Ind. ³ *Carey v. Scherer*, 55 Ill. App. 421; *Phelan v. Cuddy*, 57 Ill. App. 590.

⁴ *Gage v. Houts*, 54 Ill. App. 231.

⁵ *Id.*

wise. In case of issues of fact raised by exceptions to a master's report the upper court cannot pass upon the same, unless the evidence is returned with the master's report and embodied in the transcript of the record of the court below.¹ In such a case where the master fails to return the evidence with his report, and the excepting party in the lower court fails to make any motion requiring him to return such evidence, the error is waived, and such exceptions are properly overruled. Without the evidence before the court there is nothing upon which the court can act, in passing upon such exceptions.² If the evidence is necessary to enable the court to pass upon the questions raised, the fact that a statute requires all the evidence to be returned by the master, with his report, does not change the rule. Thus, while under the statute of Illinois the master is required to report to the court all evidence taken by him under an order of reference, yet, whether a failure so to do is fatal on appeal, depends upon whether an inspection of the evidence by the court was necessary in order to determine a hearing as to the exceptions taken to the report.³ Unless evidence relied upon to support an exception is copied regularly into the transcript, the exception will not be considered by the upper court. The substitution of original papers, even by consent, will not be sufficient. "There is no rule of practice which authorizes material evidence relied on as testimony, in support of exceptions taken, or otherwise, to be omitted from the regular transcript, and substituted by the original papers, transmitted to the upper court as evidence, by agreement of counsel."⁴ This rule does not necessitate the return of *all* the evidence, but only so much thereof as bears upon the contested questions of fact raised by the exceptions.⁵

Sixth. If any depositions were introduced upon the hearing, other than those returned by the master, they are, as we have already seen, a part of the record, and must, if the appeal involves questions of fact, be copied into the transcript.

Seventh. If any oral or documentary evidence was introduced upon the hearing, and any issue of fact, depending in whole or

¹ Mackenzie v. Flanery, 90 Ga. 590, 598, 16 S. E. 710. *Ante*, §§ 418, 471, 472.

² Gleason & Bailey Mfg. Co. v. Hoffman, 168 Ill. 25, 30, 48 N. E. 143.

³ Ronan v. Bluhm, 173 Ill. 277, 284, 50 N. E. 694.

⁴ Pruitt v. McWhorter, 74 Ala. 315.

⁵ See *ante*, §§ 413-416.

in part thereon, is involved in the appeal, such evidence must be made of record by a certificate of evidence and included in the transcript.

When the real question at issue in the upper court is one upon which the evidence can have no possible bearing, the incorporation of the evidence in the transcript is unnecessary.¹

Eighth. When a question is involved in the appeal as to the correctness of the master's rulings upon objections to his draft report, or as to the correctness of the chancellor's rulings upon exceptions taken to the report, such objections and exceptions must be included in the transcript, together with the order of the court in passing upon such exceptions.

Ninth. All other motions and rulings of the court thereon. This, however, is wholly unnecessary unless the error to be assigned involves the correctness of such motions or the rulings of the court made thereon. And, in cases where affidavits or other matters were offered in evidence in support of such motions, such affidavits or other evidence must be preserved by a certificate of evidence, and copied into the transcript. The transcript should only include so much of the record as is involved in the errors assigned.²

Tenth. The final decree, prayer for appeal, and the terms upon which the appeal is granted, together with a copy of the appeal bond, must be inserted in the transcript. Unless this is done it will be impossible for the upper court to say that the lower court has committed any prejudicial error against the rights of the complaining party.³

Unless it is otherwise provided by statute, to justify an appeal there must be a final judgment or decree. It is essential, therefore, that the transcript should show a final disposition of the controversy.⁴ And if the transcript does not show such final disposition of the controversy the appeal will be dismissed.⁵ Of course this rule has no application where an appeal is authorized and taken from an interlocutory order.

¹ *Grimmer v. Friederich*, 164 Ill. 245.

² *Wabash Ry. Co. v. Henka*, 91 Ill. 406.

³ *Baldwin v. McClelland*, 152 Ill. 42, 52, 38 N. E. 143.

⁴ *Logan v. Harris*, 90 N. C. 7; *State v. Brown*, 44 Ind. 329; *Horicon Shooting Club v. Gorsline*, 73 Wis. 196, 41 N. W. 78.

⁵ *Shroyer v. Lawrence*, 9 Ind. 323; *Wingo v. State*, 99 Ind. 343.

Eleventh. The transcript, so made up, must be duly authenticated by the clerk's certificate.¹ This certificate must be under the seal of the court.²

§ 534. What it must contain — Continued.— Counsel should be careful to see that nothing goes into the transcript except such matters as are of record under the law, or such as are made so by a certificate of evidence, as all other matters, though certified by the clerk, have no more validity than if certified by one of the parties to the suit,³ and such matters, so improperly included in the transcript, will be wholly ignored by the upper court.⁴

Counsel must be careful to see that the clerk's certificate is in proper form. When the transcript includes the entire record, the clerk so certifies, but where only such parts of the record are included as are directed by *præcipe*, or by stipulation of counsel, the certificate must conform to the facts by specifying the parts which are copied.⁵ The form given below may be used as a guide in making such certificate. In the case of *Sanders v. Village of Riverside*,⁶ in which both the complainant and cross-complainant appealed, and in which the solicitor for the cross-complainant filed a *præcipe* directing the clerk to include certain matters in the transcript, and afterwards the solicitors for both parties stipulated as to what should be included, and also that the clerk should transmit with the

¹ *Conaway v. Ascherman*, 94 Ind. 187; *Boots v. Griffiths*, 97 Ind. 241; *Walker v. Hill*, 111 Ind. 223, 12 N. E. 387; *Cooper v. Cooper*, 86 Ind. 75; *Jackson v. Van Devender*, 76 Ind. 27; *Bristol v. Home Bldg. etc. Ass'n*, 44 Ill. App. 330.

² *Rowan v. Bowles*, 25 Ill. 113; *Glos v. Randolph*, 130 Ill. 245, 22 N. E. 797; *Friend v. Cohen*, 160 Ill. 185, 43 N. E. 344. See 6 Ency. Pl. & Pr. 283, 284.

³ *McIntosh v. Saunders*, 68 Ill. 128; *Nason v. Letz*, 73 Ill. 371; *Reichwald v. Gaylord*, 73 Ill. 503; *Force Mfg. Co. v. Horton*, 74 Ill. 310; *Gilchrist v. Gilchrist*, 76 Ill. 281; *Binkert v. Wabash Ry. Co.*, 98 Ill. 205; *James*

v. Dexter, 113 Ill. 654; *Martin v. Foulke*, 114 Ill. 206, 29 N. E. 688; *Graham v. People*, 115 Ill. 566, 4 N. E. 790; *Gould v. Howe*, 127 Ill. 251, 19 N. E. 714. See 2 Ency. Pl. & Pr. 287, 288, and notes.

⁴ *Melrose v. Bernard*, 126 Ill. 496, 18 N. E. 671; *Chicago, etc. R. R. Co. v. Yando*, 127 Ill. 214, 20 N. E. 70; *Gould v. Howe*, 127 Ill. 251, 19 N. E. 714; *Chicago, etc. R. R. Co. v. Harper*, 128 Ill. 384, 21 N. E. 561, and other cases cited in 2 Ency. Pl. & Pr. 298, note.

⁵ *Reid v. Houston*, 49 Ind. 181.

⁶ U. S. Cir. Ct. of Appeals, Northern Dist. Illinois, 118 Fed. 720.

record certain original documents, the clerk's certificate is as follows:

Clerk's Certificate to Transcript.

Northern District of Illinois, }
Northern Division. } ss.

I, S. W. Burnham, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record in said court and made in accordance with the stipulation and *præcipe* filed in the cause entitled Joshua C. Sanders v. Village of Riverside, amended bill, and Village of Riverside v. Joshua C. Sanders, cross-bill, as the same appear from the original records and files of said court now remaining in my custody and control.

And I further certify that I hereby transmit with the transcript of record certain original documents used in evidence and referred to by witnesses in this cause, to wit: One, a map labeled "General Plan of Riverside, Almstead Vaux & Co., Landscape Architect," and is marked as defendant's Exhibit Number "1." Original bill filed by the Village of Riverside in the superior court of Cook county, Illinois, in August, 1885, together with the exhibits "A" and "B" thereto attached, also two certified copies of portions of the plat of the Village of Riverside, filed in the recorder's office of Cook county, Illinois, about March 6, 1872, showing blocks 11, 12, 13, 1, 2, 3, 43, 44, 45 and 46, the same being marked, respectively, complainant's Exhibits "S" and "T."

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in the city of Chicago in said district, this sixth day of December, 1901.

[SEAL.]

S. W. BURNHAM, Clerk.

Twelfth. Upon this transcript, so completed and duly authenticated, the assignment of errors must be written or attached thereto, and the document is ready for filing in the office of the clerk of the upper court.¹

IV. ASSIGNMENT OF ERRORS.

§ 535. Assignment of errors — A pleading.— Pleadings are as essential in a court of error as in the court below. The assignment of error serves the same purpose in the former as a

¹ See the next three sections where the subject of assignment of errors is treated in detail. These suggestions as to the make-up of a transcript are necessarily general in character, and of course the transcript must be made with reference to the facts and circumstances of the particular case.

declaration in the latter — to place in the record and before the court the very issue to be determined.¹ It would be just as regular and proper for the lower court to render a judgment in a cause where there is no declaration as for the upper court to affirm or reverse a judgment where there is no assignment of errors.² Without an assignment of errors it is impossible for the opposite party and the court to even guess what part of the record is to be challenged, as in such a case the appellant might wander through the whole record in search of error, and it leaves the opposite party wholly in the dark as to what points he will raise.³ The assignment of errors is regarded as the pleading of the party.⁴

As the office of an assignment of errors, like that of a pleading, is to give notice to the court and the opposite party of the matters intended to be put in issue by the pleader, like a pleading it must be specific. Not only must each specification be definite and certain, but each specification must be complete in itself, and for the same reason that each count in a declaration or each paragraph in a complaint must be complete, and as one defective count or paragraph cannot be aided by the allegations of another, so each specification of an assignment of errors must be tested by itself alone.⁵

Errors must be specifically and definitely pointed out.⁶ As the proceedings of the upper court are confined strictly to a review of the action of the lower court, the allegation always is "that the court erred," pointing out the precise point in which the error consists. Each error relied upon should be separately and specifically pointed out, although, in some cases, an assignment may be broad enough to cover minor details. For example, under an allegation that the court erred in overruling a motion for a new trial, the party may insist that the court erred in the admission or exclusion of evidence,⁷ although the

¹ *Armstrong's Appeal*, 68 Pa. St. 409; *Williston v. Fisher*, 28 Ill. 43; *Ditch v. Sennott*, 116 Ill. 288, 290, 5 N. E. 395.

² *Williston v. Fisher*, *supra*.

³ *Clements v. Hearne*, 45 Tex. 415; *Altman v. Wheeler*, 18 Mich. 240; 2 Ency. Pl. & Pr. 921, 922.

⁴ *Gibler v. Mattoon*, 167 Ill. 18, 47 N. E. 319.

⁵ *Elliott*, Appellate Procedure, secs. 308, 309.

⁶ *Swift Co. v. Foe*, 167 Ill. 443, 47 N. E. 761; *Gibler v. Mattoon*, 167 Ill. 18, 47 N. E. 319.

⁷ *Chicago & R. I. Ry. v. Coal & Iron Co.*, 36 Ill. 60; *Chamberlain v. Cary*, 169 Ill. 34, 48 N. E. 173; *Chatsworth v. Rowe*, 166 Ill. 114, 46 N. E. 763.

far safer plan is to assign each error relied upon separately. In Illinois, under Supreme Court Rule No. 11, the assignment of error must be "written upon or attached to the record."¹ And in that state, unless errors are so assigned upon the record, the decree of the court below will be affirmed.² But where a party makes a mistake by assigning errors otherwise than upon the record or attached to the same, he will be permitted to correct the same instant.³

A different practice obtains in the federal courts. There, under the statute and rules of court, the assignment of errors is required to be filed in the court below and comes to the upper court as a part of the transcript duly certified by the clerk.⁴ Under the head of "Errors Relied Upon," forming the second division of the brief of the appellant or plaintiff in error, he is required to set out particularly the errors relied upon. Under these rules, "when the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it."⁵ As to who may assign errors, we find that there are only certain parties who have this right. For example, it has been repeatedly held that a party cannot assign for error that which does not affect him, but is prejudicial only to others who do not complain.⁶ And if a party does assign as error that which only injuriously affects another, the proper course is not to dismiss the appeal, but to affirm the decree of the court below. So, too, parties who have consented to an irregularity are not permitted to

¹ Buckley v. Eaton, 60 Ill. 252; Ditch v. Sennott, 116 Ill. 288, 5 N. E. 395; Benneson v. Savage, 119 Ill. 135.

² Dickson v. C. B. & Q. R. R. Co., 81 Ill. 215; Benevolent Society v. Baldwin, 86 Ill. 479; Capek v. Kropik, 129 Ill. 509, 21 N. E. 836; Lancaster v. Waukegan, 132 Ill. 492, 24 N. E. 629.

³ Gibbs v. Blackwell, 40 Ill. 51; Benneson v. Savage, 119 Ill. 135; Ditch v. Sennott, 116 Ill. 288, 291, 5 N. E. 395.

⁴ See U. S. Stat., sec. 997; U. S. Sup. Court Rule No. 21; Rules U. S. Circuit Court of Appeals, Seventh Cir-

cuit, Nos. 11, 24. For these rules, see *post*, § 545.

⁵ See these rules, *post*, § 545.

⁶ Henrickson v. Van Winkle, 21 Ill. 274; Horner v. Zimmerman, 45 Ill. 14; Greenman v. Harvey, 53 Ill. 386; Richards v. Greene, 78 Ill. 525; Robinson v. Brown, 82 Ill. 279; Willemine v. Dunn, 93 Ill. 511; Grand Tower, etc. Co. v. Cady, 96 Ill. 430; Hesing v. Attorney-General, 104 Ill. 292; Ransom v. Henderson, 114 Ill. 528, 4 N. E. 141; City of Chicago v. Cameron, 120 Ill. 447, 11 N. E. 899; Lager v. Mutual Union Loan & Building Ass'n, 146 Ill. 283, 33 N. E. 946; Press v. Woodley, 160 Ill. 433, 437, 43 N. E. 718.

assign error upon it. For example, in a criminal case the defendants moved the court to require the witnesses, who were Chinamen, to take the "Chinese chicken-oath." A part of the witnesses were so sworn, and it was held by the court that the defendants had no right to complain.¹

§ 536. **Prolixity.**— Good faith and policy alike dictate the assignment only of such errors as counsel intend to urge upon the court as ground of reversal. The practice of assigning a great number of errors, good, bad and indifferent, and, what is still worse, pressing the whole upon the court in an argument of great length, is frequently condemned by the courts. Mr. Justice Agnew, of the supreme court of Pennsylvania, speaking for the court, says: "We have in this case twenty-six errors assigned to a single charge of ordinary length, which is as much as to say that the judge did not open his mouth unless to commit an error. This skill at multiplication is accomplished by dividing the charge into short paragraphs and assigning error to each. The injustice of thus manipulating a charge by piecemeal is obvious; while a still more serious injury is done to the cause by indiscriminate allegations of error and useless discussion. They distract our minds by diverting them to consider matters of no moment, and weaken the strong points, if any, by heaping upon them those that are feeble. Upon a writ of error it is much better to consider well the positions which seem to be fairly tenable, and to present them alone. Then the argument spends its concentrated force upon that which commands consideration, and the attention of the judges is not diverted to that which is immaterial. In this way real error is apt to be detected; while in the other, the mind, wearied by unimportant exceptions and inconclusive discussion, is more likely to overlook material errors. We commend these remarks to those who practice before us."² The supreme court of the United States also condemn this practice in equally as strong language, as follows: "This practice of unlimited assignments is a perversion of the rule, defeating all its purposes, bewildering the counsel of the other side, and leaving the court to gather from a brief, often as prolix as the assignments of error, which of the latter are

¹ *Bow v. People*, 160 Ill. 438.

² *Dimes Sav. Inst. v. Allentown Bank*, 65 Pa. St. 116.

really relied upon.”¹ Yet while the pleader is expected to be careful lest his assignments are unnecessarily prolix, equal caution is required to see that they are broad enough to cover all the actual errors relied upon, because the same rule obtains here as in any other pleading—a party is not permitted to go beyond his allegations. He will not be permitted to urge any error not included in his assignment.² It has been repeatedly held that no errors will be considered by the court except such as are assigned upon the record.³

§ 537. **Form of.**—The assignment of errors may be in the following form, varied, of course, to suit the circumstances of the case:

Assignment of Errors.

STATE OF ILLINOIS, } ss. To the December Term thereof, A. D.
Supreme Court. } 1902.

Henry M. McVey and Mary J. McVey, Appellants, v. John L. Warner, Appellee.	}	Assignment of Errors.
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And now come the said Henry M. McVey and Mary J. McVey, appellants,⁴ and say that, in the record and proceedings aforesaid, there is manifest error in this, to wit:

First. The court erred in overruling appellants' demurrer to the bill of complaint.

Second. The court erred in referring the cause to the master against the objection of appellants.

Third. The court erred in overruling appellants' exceptions, and each of them, to the master's report.⁵

¹ Phillips, etc. Co. v. Seymour, 91 U. S. 646.

² Prairie State Loan Ass'n v. Gorrie, 167 Ill. 414, 419; Doubet v. Peoria Sav. Loan & Trust Co., 93 Ill. App. 687.

³ Gilbert v. Maggord, 1 Scam. (Ill.) 471; Martin v. Russell, 3 Scam. (Ill.) 342; Protection Life Ins. Co. v. Foote, 79 Ill. 361; Hyslop v. Finch, 99 Ill. 171; Pittsburg, Ft. W. & C. R. Co. v. Reich, 101 Ill. 157; Ditch v. Sennott, 116 Ill. 288, 291, 5 N. E. 395.

⁴ If the assignment of errors is joint and several, then, after the word "appellants," add, "who jointly and severally say," etc.

⁵ This is the form of specification

generally used for calling in question the propriety of the order overruling exceptions to a master's report, yet, where there are two or more exceptions, it is better to have a separate specification of error for each exception overruled, as some other courts hold that, under the general specification, the order of the lower court must be approved if any one of the exceptions is bad. This is the same rule that is applied to an objection taken to a mass of testimony where, if any part is admissible, the objection will be overruled. So, too, a general exception to a number of instructions is bad if any one of

Fourth. The court erred in approving and confirming the master's report.

Fifth. The court erred in entering the decree in favor of appellee and against appellants.

Sixth. The court erred in overruling appellants' motion to re-refer the cause to the master that appellants might introduce further evidence.

Seventh. The court erred, etc. [*assign as many errors as the case may require*].

By reason whereof, and for other good and sufficient reasons apparent upon the face of the record, appellants pray that said decree may be reversed, etc.

By JOHN T. JONES,
Solicitor for Appellants.

§ 538. **Form of — Continued.**—In the federal courts the assignment of errors must be filed in the lower court, under the rules, and goes to the upper court as a part of the transcript. These rules generally prescribe what the assignment of errors shall contain, as well as the "specification of errors," set out in the brief of the appellant.¹

The following form, used in a case in the United States circuit court at Chicago, conforms to the rules of practice and may be used as a guide in other cases:

Assignment of Errors.

IN THE CIRCUIT COURT OF THE UNITED STATES,

Northern District of Illinois,

Northern Division.

Joshua C. Sanders	}	Amended Bill.
v.		
The Village of Riverside	}	No. 21,878.
.		
The Village of Riverside	}	Cross-bill.
v.		
Joshua C. Sanders.		

Assignment of Errors.

And now comes the said Joshua C. Sanders, complainant in said amended original bill and defendant in said cross-bill, the instructions is good. The safer ruled. *Bowers v. Bennethum*, 133 course, therefore, is to assign error Pa. St. 306, 309, 19 Atl. 624; *Keowne separately as to each exception over v. Love*, 65 Tex. 152, 155; *Miller v.*

¹See U. S. Sup. Court Rule, No. 21, and Rules U. S. Cir. Court of Appeals, Seventh Circuit, Nos. 11, 24, *post*, § 545.

by John L. Pearson and Samuel W. Packard, his solicitors, and says that in the record, proceedings and decree entered in this cause there is a manifest error, and that the said complainant has been denied his just rights by the dismissal of his said bill by the said circuit court; and the said complainant hereby assigns and sets out separately and particularly the following errors, namely:

1. The court erred in dismissing the said amended bill for want of jurisdiction.

2. The said court erred in refusing to enter a decree in said cause and cross-cause quieting the title of the said complainant as against the said Village of Riverside to the whole of the two strips of land claimed by said complainant in his bill.

3. The court erred in not entering a decree quieting the title of the said complainant to that part of said two strips of land found by the said master in chancery, E. B. Sherman, to belong to the said complainant.

4. The court erred in not sustaining the exceptions, and each of them, filed by the complainant to the findings and report of E. B. Sherman, the master in chancery of said court.

5. The court erred in not sustaining the eighth exception of the complainant to the finding of fact by the master, which was as follows: [*Here copy exception in full.*]

6. The court erred in not sustaining the second exception of the complainant to the finding of fact by the master, which was as follows: [*Here copy exception in full.*]

7. The court erred in not sustaining the first exception of the complainant to the findings of law by the master, which was as follows: [*Here copy exception in full.*]

8. The court erred in not sustaining the fourth exception of the complainant to the findings of fact by the master, which was as follows; [*Here copy exception in full.*]

Wherefore, the said complainant, Joshua C. Sanders, prays that the said decree may be reversed, and that the said circuit court of appeals may enter a decree in favor of the said complainant in said cause, quieting his title to the said land in controversy, or ordering and directing the said circuit court to enter such decree.

JOHN L. PEARSON,
SAMUEL W. PACKARD,
Solicitors for said Complainant,
Joshua C. Sanders.¹

Vernoy, 3 Tex. Civ. App. 675; Yoe & Harris v. Montgomery, 68 Tex. 338, 340, 4 S. W. 622; I. & G. N. Ry. Co. v. Leak, 64 Tex. 651, 657; Cruse v. McQueen, 25 S. W. 711; Texas, etc. R. Co. v. Donovan, 23 S. W. 735, 736. The rules of the United States supreme court, and also those of the circuit courts of appeals, require a separate specification for each exception, setting out the exception in full. See form given in next section, also note to same.

¹ Adapted from case, 118 Fed. 720.

V. BRIEFS AND BRIEF MAKING.

§ 539. **Briefs and brief making — Importance of subject.**— Assuming that the record has been properly made in the lower court and the transcript properly prepared, certified and filed, we come now to the most important, and generally the last, duty to be performed by the attorney in the interest of his client — that of the proper presentation, on paper, to the court of so much of the history of the matter in controversy and the proceedings in the lower court as is necessary for the information of the court, together with a statement of the grounds upon which he relies for reversal, a brief of the authorities in support of the same, and, finally, a clear, clean, logical argument in support of his contentions. Any man with a fair knowledge of the law, ready wit, a good voice and a good command of language may obtain the reputation of being a fine lawyer, and may, as a matter of fact, be eminently successful in the lower courts, and yet be but illy qualified for the duties just mentioned. Indeed it is in the proper discharge of these duties, in a complicated case in the upper court, that the real lawyer has an opportunity to show the “mettle he is made of.” The importance of the subject to counsel, client and court alike justifies the belief that the following suggestions upon “Briefs and Brief Making” will be found useful, especially to the younger members of the profession, for whom they are especially intended. But, it must be admitted failure to properly present a case to the upper court is oftener attributable to the negligence rather than the ignorance of counsel, but either is inexcusable. If an attorney does not know how to do it he should not undertake it, and if he does know and fails to secure a fair hearing for his client upon the merits his negligence and carelessness are alike inexcusable. There may be rare cases where an attorney, like a benighted traveler, cannot tell in advance which of two paths before him he should take, and, being compelled to take one or the other, is not, therefore, to blame if it turns out to be the wrong one; but, ordinarily the course to be pursued is so well defined by statute, or the rules and practice of the court, that there is no excuse for a failure to adopt the right course.

The judges of the upper courts complain that counsel, as a rule, do not realize the labor devolving upon the court in attempting to: first, get a clear and definite comprehension of the facts involved in a complicated controversy; second, in ascertaining the precise objections being urged by the dissatisfied party; third, in applying the law to such facts and objections. Counsel should remember that there is a vast difference between starting in with the summons in a cause, and following it step by step, as they are taken from time to time, and the position of another, who, after the work, covering sometimes years, is all done, the record made, attempts to go backward, and familiarize himself with all that court and counsel have done. With these thoughts in mind counsel should never be restive under rules adopted by appellate tribunals for the purpose of securing from the attorney all the help possible in such work. The real lawyer is patient, laborious and painstaking, and will never, knowingly, attempt to put upon the court a duty which, in justice to himself, his client and the court, he ought to discharge himself. No wonder that the judge, overburdened with work, now and then grows impatient while struggling over a record, brief, or abstract, that looks as though it had been thrown together with a pitchfork, in a vain endeavor to find the real points in controversy.

When we read the description of the records, abstracts and briefs placed before the judges in the supreme court of Georgia, we are not astonished at the following strong language of Mr. Justice Jackson of that court. He says: "This record consists of a huge mass of disconnected and ill-assorted papers, with pages omitted, as appears from the paging. This mass, unwieldy in itself, is subdivided into ten or more parts, each parcel to itself as a separate transcript, and heterogeneous parcels of matter, wholly distinct from each other so far as the record discloses, are grouped in the same parcel. It is all in writing, none of it printed, and the writing, a good deal of it, hard to decipher. Reference to exceptions and amendments is sometimes made by numbers, and sometimes by numbers with letters prefixed or annexed to them; and there is no discoverable means from the bill of exceptions, or any of the ten parts of the transcript, of ascertaining to what these lettered figures refer, nor does the abstract of the counsel for plaintiff in error, or the

brief, throw such light upon this confusion as to bring order out of chaos." With this "heterogeneous mass" before him and no assistance from counsel by brief or abstract, in his effort to bring "order out of chaos," we are not surprised that the tired and overworked judge gave expression to his feelings in the following, as we hope, overdrawn picture of the careless and negligent methods of the Georgia bar: "We venture to say that there is not in the civilized world an appellate court required to investigate and adjudge cases in the last resort with such blurred and blotted, such confused and unintelligible, such interlined and ill-paged records, and hopelessly obscure and inexplicable transcripts, divided into different parts, and written in all manner of handwriting — some with half a page written and the rest blank, some with the whole of one page blank and two lines on the next written, and such abstracts of pleadings and evidence, as those which meet the eyes of this court at every term. The honor of the state, the pride every man should have in the administration of justice in it, in the last resort, revolts at this rickety condition of things."¹ In a similar case the venerable Judge Gary, of the Illinois appellate court, has our sympathy when he admonishes a negligent lawyer in the language of Isaiah,² "Whom shall he teach knowledge? And whom shall he make to understand doctrine? . . . For precept must be upon precept; line upon line; here a little and there a little."³

§ 540. **Patience — Hard work.**—Tact, skill, genius are important, but nothing can take the place of patient, laborious work. Nothing else will ever render you master of the situation. The first essential thing is, by minute, patient study to obtain a thorough understanding of the facts of your own case. As was so well said by Judge Dillon: "Not some other case, but *the* case in hand. Cases presenting to superficial observation the same general features are often found, upon more careful scrutiny, to contain elements or to be wanting in elements which make them essentially distinguishable. The same state of facts often gives rise to different principles, depending upon the character or relations of the parties to the controversy. A very common fault is found in the failure to

¹ Arthur v. Gordon County, 67 Ga. 220.

² Isaiah, XXVIII, 9, 10.

³ Bishop v. Loewns, 63 Ill. App. 351.

take into consideration *all* the facts upon which the legal duty or liability arises. But perhaps the most difficult duty of the lawyer is to determine which of the facts are essential and which are non-essential; to eliminate the latter and to show, against the possible contention of the opposing counsel, their immateriality. The facts of a given case may be and often are numerous. But many, perhaps a majority, turn upon one or two controlling points. Study and careful discrimination are necessary to select from the mass of facts those that are controlling; to select from the store-house of the law the legal principles which justly apply to the controlling facts." It follows that two cases may be almost identical as to the facts, and yet, owing to one or two essential facts which, upon close examination, are found not to be common to both, require the application of a wholly different legal principle; and, for the same reason, a case cited by counsel may be apparently so different from the one in hand as to seemingly render it wholly inapplicable, and yet, upon closer scrutiny, it may be found to be precisely in point. It is in this nice discrimination of the essential and underlying facts of cases where the real lawyer does his best work, not only in the defense of his own positions, but also in attacking those of his adversary.

§ 541. Method — Temper.— In the preparation of your brief you should keep constantly in mind the fact that method is only second in importance to matter. The apostolic injunction, "Let all things be done decently and in order," applies with especial force to the work before you. First, be sure that the method you adopt is the logical and proper one for the case in hand, and then be sure that you follow it. "If the method adopted leads to illogical cross-divisions, to the omission of material points, or to the violation of logical order, the result will be a brief of which no lawyer should be proud. The framework, if laid out in symmetrical proportions and in due order, will add greatly to the power of your brief and do much to dispel confusion and clear away obscurities."¹

The lawyer who has a clear conception of what is involved in his case, both of fact and of law, who begins his brief in a proper manner and arranges his points in a regular and logical

¹ Elliott, Appellate Procedure, sec. 439.

way, is the one who acquits himself with credit and properly protects the interests of his client. On the contrary, the lawyer whose knowledge of his case is vague and indefinite, and who, for want of a better method, begins in the middle of his case and works towards both ends, sometimes in a rambling way, covering the same ground two or three times, not only does himself no credit, but renders little aid to the court in its effort to ascertain what the rights of his client are, and whether they have been properly protected by the decision of the court below. Mr. Justice Cartwright, of the supreme court of Illinois, in speaking of this matter says: "The lawyer who only knows in a general way that he has had a law-suit, and has been badly used by somebody, may still consume much ink and paper in a promiscuous overhauling of the case and complaining that whatever was done or refused was error. It will help him no less than the court if he will first arrange and classify his complaints and set them down in a brief, referring them to rules of law."¹

But, above all, waste no time in abusing the opposite counsel or in saying hard things about the court below. While, in the heat of a legal battle before a jury, you may possibly be pardoned if now and then you lose your patience and say things which it had been better had they been left unsaid, yet you must now remember that you are before a tribunal where the calmness of judicial inquiry finds no place for the exhibition of your spleen or malice and yields its assent only when swayed by logic and reason. Any evidence of anger permitted to show itself in your brief will only provoke a smile from the judges when read in the council chamber, or perhaps a justly merited rebuke from the court. If you are mad, let there be "method in your madness," at least enough of it to suppress the evidence of your anger. Better employ your surplus energy in an honest effort to convince the court that the errors assigned by you are well taken and that justice and equity require a reversal of the decree of the court below.

§ 542. **Frivolous objections.**—Waste no time on frivolous and immaterial objections. Every presumption is in favor of the regularity of the proceedings of the court below, and you

¹ Chicago Legal News, vol. 28, p. 176.

can rest assured of one thing — the upper court is not going to reverse the action of the lower court unless you can point out and satisfactorily establish the existence of material error; that is, an error injuriously affecting the rights of your client. During the existence of a protracted litigation numerous errors may be, and usually are, committed; indeed, if upper courts only affirmed judgments in which the proceedings were absolutely free from error, nine-tenths of the cases would be reversed. It is useless to spend time and labor in pressing upon the court an objection that comes under the head of "harmless error." Such a course is even worse than useless, because it tends to divert the attention of the court from real and substantial errors, which alone should be selected and urged with all the force at your command.

Quoting again from Mr. Justice Cartwright, whose long experience as one of the judges of the Illinois supreme court lends additional force to his remarks, we say:

"Little and trifling things receive no more respect in a printed argument than they should in an oral one, and they may as well be left out as to be put in, as they often are, with the idea that if they do not amount to much they have some weight, and may influence some member of the court. After reading a few of them, the court will be apt to think that the grievances are all small and fancied, and the case is of little merit, since the party is compelled to resort to petty complaints and small points. Such an impression will naturally tend to prejudice the argument in general. The time of the court is wasted on them, because they must generally be answered for fear that the attorney will complain that his case has not received careful attention."

§ 543. Rules of court — Illinois.— The rules of court in each jurisdiction usually contain specific directions for the preparation of printed abstracts or statements, whether to be printed and bound separately, or forming a part of the brief; also, as to the preparation, time of filing, number of copies to be filed, and other details relative to briefs proper, which rules must, of course, be carefully examined and literally followed. The practice in the supreme and appellate courts of Illinois, in the supreme and appellate courts of Indiana, and that in the federal courts, as outlined below, is given as examples of dif-

ferent methods of accomplishing the same result, viz., as above stated, placing before the judges, in some convenient form, the facts disclosed by the record, so far as the same are necessary to enable them, with the least amount of labor, to intelligently pass upon the questions involved in the appeal, together with contentions of counsel and authorities cited in support thereof; and, first, as to the practice in Illinois.

The supreme and appellate court rules of Illinois provide that the "Brief and Argument" of the appellant, or plaintiff in error, shall consist of three parts, or divisions, as follows:

I. A Short Statement of the Case.

This "Statement of the Case" includes the following:

First. The form of the action.

Second. The nature of the pleadings sufficiently to show what the issues were, and to present any question subject to review arising on such pleadings.

Third. In cases depending upon the evidence, the leading facts which such evidence proved or tended to prove, without discussion or argument and without detail.

Fourth. How the issues were decided upon the trial or hearing, and what the judgment or decree was.

Fifth. The errors relied upon for a reversal.

The rule further provides as follows:

The statement so made will be taken to be accurate and sufficient, unless the opposite party shall, in his brief, point out wherein it is inaccurate or insufficient. Following the statement of the case, the brief shall conclude with the points made and the authorities relied upon in support of them; and, in citing cases, the names of the parties must be given with the book and page where the case is reported.

II. Brief of Points Made and Authorities.

This is the *brief* proper, and, under the rule, three things are provided for:

First. It must include "the points made and the authorities relied upon in support of them."

Second. To secure accuracy in citation of authorities, the rule provides that "the names of parties must be given, with the book and page where the case is reported."

Third. And, to secure fairness, the rule further provides that, "No alleged error or point not raised in such brief shall be raised afterwards, either by reply brief, or in oral or printed argument, or on petition for rehearing."

III. The Argument.

The rule further provides that "The brief of any party may be followed by an argument in support of such brief, which shall be distinct therefrom, but may be bound with the same. The argument shall be confined to discussion and elaboration of the points contained in the brief. Evidence shall not be copied at length in such argument, but it shall refer to the abstract for the same."

This supreme court rule is adopted and followed in the appellate courts of that state.

Under the foregoing rules the printed presentation of a case on the part of the appellant, or plaintiff in error, consists of three important parts or divisions:

First. The "Abstract" and "Statement of Case," counted as one, the object being the same, viz.: placing the necessary facts before the court.

Second. The "Brief" proper, showing the points made and the authorities relied upon in support of them.

Third. The "Argument," the purpose of which is "to elaborate the points set down in the brief, and by reasoning and illustrations apply them to the case under discussion."

Brief of Appellee or Defendant in Error.

The rule further provides that the brief of the appellee, or defendant in error, shall be as follows:

"The brief of appellee or defendant in error shall contain a short and clear statement of the propositions by which counsel seek to meet the alleged errors and sustain the judgment or decree, or by which such errors are obviated. Counsel may also, in such statement, point out any insufficiency or inaccuracy in the statement of the opposite party, and supply or correct the same, and, in cases depending on the evidence, may state the leading facts or conclusions which the evidence proved or tended to prove, without discussion or argument and without detail. Such brief shall conclude with the points

and authorities relied upon, in like manner as required in the briefs of appellant or plaintiff in error."

§ 544. Rules of court — Continued — Indiana.—Rules 21 to 24 of the supreme and appellate courts of Indiana, relative to briefs, provide, among other things, as follows:

I. Statement.

"The brief of appellant shall contain a short and clear statement disclosing:

"*First.* The nature of the action.

"*Second.* What the issues were.

"*Third.* How the issues were decided, and what the judgment or decree was.

"*Fourth.* The errors relied upon for a reversal.

"*Fifth.* A concise statement of so much of the record as fully presents every error and exception relied on, referring to the pages and lines of the transcript. If the insufficiency of the evidence to sustain the verdict or finding, in fact or law, is assigned, the statement shall contain a condensed recital of the evidence in narrative form so as to present the substance clearly and concisely. The statement will be taken to be accurate and sufficient for a full understanding of the questions presented for decision, unless the opposite party in his brief shall make necessary corrections or additions."

II. Statement of Points Relied Upon.

"Following this statement, the brief shall contain, under a separate heading of each error relied on, separately numbered propositions or points, stated concisely, and without argument or elaboration, together with the authorities relied on in support of them; and in citing cases, the names of parties must be given, with the book and page where reported. No alleged error or point not contained in this statement of points shall be raised afterwards, either by reply brief, or in oral or printed argument, or on petition for rehearing."

III. Argument.

"The briefs of any party may be followed by an argument in support of such briefs, which shall be distinct therefrom, but shall be bound with the same. The argument shall

be confined to discussion and elaboration of the points contained in the briefs. The names of counsel shall be affixed to all briefs filed by them."

Brief on Part of Appellee.

Rule 23 provides that the brief of appellee shall be as follows:

"The brief of appellee on the assignment of errors shall point out any omissions or inaccuracies in appellant's statement of the record, and shall contain a short and clear statement of the propositions by which counsel seek to meet the alleged errors and sustain the judgment or decree, or by which such errors are obviated. Following this statement the brief shall contain the points and authorities relied on in like manner as required in the appellant's brief."

§ 545. Rules of court — Continued — Federal courts.— The practice as to the preparation, printing and filing of transcripts and briefs is practically the same in the United States supreme court and the circuit courts of appeals, the latter having adopted, almost literally, rules 10 and 21 of the supreme court rules.¹ The same rules, with but slight variations, are adopted by the circuit courts of appeals in all the circuits.² Rule 23 of the circuit court of appeals, seventh circuit, provides for the printing of the record under the supervision of the clerk, which record, when so printed, is referred to in the briefs of counsel, instead of to the abstract as in the state court. Rule 24 relates to briefs, and provides that they "shall contain, in the order here stated, and under the respective titles, 'Statement of Case,' 'Errors Relied Upon,' and 'Brief of Argument.'"

I. Statement of Case.

"A concise abstract, or statement of the case, presenting succinctly the questions involved, in the manner in which they are raised."

II. Errors Relied Upon.

"A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and par-

¹ City of Lincoln v. Sun Vapor Street-Light Co., 8 C. C. A. 253, 59 Fed. 756.

² See 2 Beach, Eq. Pr. 1045 *et seq.*

ticularly each error asserted and intended to be urged, and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be in an instruction given or in one refused. When the error alleged is to a ruling upon the report of a master the specification shall state the exception to the report and the action of the court upon it. Following each specification there shall be a reference by page to the portion of the printed record on which the question arises."

III. Brief of Argument.

"A brief of the argument exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length."

Appellee's Reply Brief.

The rule of the United States circuit court of appeals, seventh circuit, governing appellee's reply brief, provides that it shall conform to the requirements of the rule governing the brief of the appellant, "except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted. Either party, at or before the argument of the cause, may file a supplemental brief strictly confined to matter in reply to the brief of the opposite party."

It being impossible to present in this work anything more than some typical illustrations of the rules generally adopted by upper courts, relative to the preparation of briefs and abstracts, I selected for that purpose the foregoing,—those of Illinois, a common-law state, those of Indiana, a code state, and those of the federal courts where the English chancery practice is followed.

§ 546. Application of foregoing rules — The abstract.— An examination of the foregoing rules shows that, while they differ to some extent in details, yet in a general way they parallel each other in this, viz., in getting before the court the facts necessary to enable it to properly pass upon the issues, a statement of errors in the proceedings in the court below upon which the party seeks a reversal, a brief of points relied upon, with a citation of authorities in support of them, and, finally, an argument intended to aid the court in arriving at a just conclusion upon the questions involved. This is the proper, natural and logical method of presenting any question to a tribunal for solution,— first, a statement of the facts, second, the contentions of the speaker, and, lastly, the argument in support of such contentions. In the following sections will be found some suggestions as to these several steps, under the titles of “Abstracts,” “Statement of Case,” “Errors Relied Upon,” “Brief of Authorities,” and “Argument.”

The facts necessary to a proper understanding of the questions involved in the appeal are imbedded in the record, consisting perhaps of hundreds, and sometimes of thousands, of pages of type-written matter, the bare reading of which would require weeks, or perhaps months, of time, which it would be impossible for the judges to devote to it, with any consideration whatever to the other business of the court. Not only this — counsel can do this work, for which they are paid; a labor which it would be impossible for the judges to perform, even if time permitted them to make the effort. The attorney, who started in with the filing of the bill, and who has followed the case, step by step, through all the various proceedings in the lower court, who knows what he is seeking to accomplish by his bill, or the defense thereto sought to be interposed by his answer, knows what the facts are as shown by the record. He, of all others, can, best and with the least amount of labor, select from the record the material facts and arrange and group them so as to best support his contentions and so that they can be most readily understood by those who, like the judges of the upper court, are unfamiliar with them. This is frequently no light task, owing to the vast amount of immaterial matters which, in spite of both court and counsel, get into every contested case.

In some of the state courts the facts found in the transcript necessary to be understood by the court, in order to enable it to pass upon the questions involved in the appeal, are placed before it in the form of an *abstract*, printed and bound separate and apart from the *brief*, while in the federal courts the whole record is printed under the supervision of the clerk of the court, and is thus used, together with the "Statement of Case," the first division of appellant's brief, in which he states the material facts shown by the record, so far as may be necessary to enable the court to properly understand and pass upon the questions involved in the appeal, referring to the pages of the record, as, also, in his brief and argument. In other state courts the rules require the transcript to be carefully prepared, with marginal references to the contents, and the lines of each page carefully numbered, so as to render it easier to find matters upon reference to it, thus seeking, in a different way, what is done by printing the entire record in the federal courts. In these courts more use is made of the record itself than in jurisdictions, as in Illinois, where an abstract of the record is required, the latter taking the place of the record and rendering a reference to it unnecessary, except in cases where the correctness of the abstract is questioned, or where there is a dispute as to what the record does show.

Rule 14 of the Illinois supreme court rules, among other things, provides as follows:

"In all cases the party bringing a cause into this court shall furnish a complete abstract or abridgment of the record, referring to the pages of the record by numerals on the margin. And where the record contains the evidence, it shall be condensed in narrative form in the abstract, so as to clearly and concisely present its substance. The abstract shall contain a complete index, alphabetically arranged, giving the page where each paper or exhibit may be found, with the names of the witnesses and the pages of the direct, cross and redirect examination."

§ 547. Application of the foregoing rules — The abstract — Continued.— A common error in attempting to comply with this rule, especially on the part of young attorneys, is that of supposing that everything in the record must be abstracted. Every abstract must show: The convening of the court, juris-

diction of the person, jurisdiction of the subject-matter and a final disposition of the cause. The first is shown by the placita, the second by the process and its return, or by its equivalent — the entry of an appearance,— the third by the pleadings, and the last by the judgment or decree of the court.¹ These, as has already been shown, are essential parts of every transcript and, therefore, should always be shown in the abstract. Besides the foregoing only so much of the record need be abstracted as is necessary to enable the court to understand and pass upon the questions actually involved in the appeal. For example, the question involved in the appeal may be one upon which the evidence can have no bearing and yet the evidence may have been included in the transcript and thus become a part of the record. In such a case, of course, the evidence need not be abstracted. The same may be said of all other parts of the record which have no bearing upon the issues presented to the upper court. But every material thing pertaining to the issues involved in the appeal must be fully abstracted. Every error relied upon must be shown in the abstract. It is not sufficient that such error appears in the record, as the court will not search the record for errors which should be shown by counsel in their abstracts.² Whilst it is not necessary to abstract such portions of the record as involve no question, still the portion upon which error is assigned should be fairly and intelligibly presented by the abstract, so the court may see to what the objection is taken.³

The abstract must fairly and intelligibly present to the court in a condensed form the substance of those portions of the record. If parties expect to have their assignments of errors examined by the court they must show a fair effort to fully and fairly present their cause according to the rules established for their guidance.⁴ Such an abstract must be an abridgment of the substance of the record, that is of such portions as bear

¹ *Baldwin v. McClelland*, 152 Ill. 450; *City Electric Ry. Co. v. Jones*, 42, 52, 88 N. E. 148. 161 Ill. 47, 43 N. E. 613; *City of Rood-*

² *Gibler v. Mattoon*, 167 Ill. 18, 47 N. E. 319. *house v. Christian*, 158 Ill. 137, 141, 41 N. E. 748; *Chapman v. Chapman*,

³ *Johnson v. Bantock*, 88 Ill. 111, 129 Ill. 386, 390, 21 N. E. 806; *Chicago, etc. R. R. Co. v. Lackman*, 62 Ill. 270. App. 437.

⁴ *People v. Angerer*, 23 Ill. App.

on the questions involved.¹ It must, as against the appellant, be sufficiently full and accurate to present all the errors relied upon.² A mere index is not sufficient.³ Such a rule is a living one and must be complied with,⁴ and such an entire disregard of a salutary rule will not be tolerated, but the penalty for its violation will be enforced,—that is, the suit will be dismissed,⁵ as the judges will not take the time, if they had the inclination, to search through the original record (sometimes containing many hundreds of pages) to find out the merits of the case.⁶

The upper courts, as a rule, are determined that the labor imposed upon counsel will not be performed by the court, hence, in case of a defective abstract, the appeal will be dismissed or the decree of the court below affirmed. If, in the judgment of the appellee, the abstract furnished by the appellant is deficient either in not being full enough to properly present the questions involved in the appeal, or because it is unfair in its statements, it is his duty to furnish a better one.⁷ A mere complaint in his brief or argument of the unfairness of his opponent will not answer the purpose. The judges of the upper courts have no time, with any due consideration of the rights of other litigants, to examine voluminous records in search of facts which it is the duty of counsel to lay before them in the form of printed abstracts. As is well said by Mr.

¹ *City Electric Ry. Co. v. Jones*, 161 Ill. 47, 43 N. E. 618; *Miller v. Potter*, 59 Ill. App. 125; *Cronin v. Sullivan*, 61 Ill. App. 838; *Shields v. Brown*, 64 Ill. App. 259.

² *Chicago, P. & St. L. Ry. v. Wolf*, 137 Ill. 360, 27 N. E. 78; *Wabash R. Co. v. Smith*, 58 Ill. App. 419; *Bishop v. Loewus*, 63 Ill. App. 351; *Strohm v. People*, 160 Ill. 582, 43 N. E. 622; *Shields v. Brown*, 64 Ill. App. 259; *City Electric Ry. Co. v. Jones*, 161 Ill. 47, 43 N. E. 618.

³ *Florez v. Brown*, 37 Ill. App. 270; *Lake v. Lower*, 30 Ill. App. 500; *Geraty v. Druiding*, 44 Ill. App. 440; *Gilbert v. Coons*, 87 Ill. App. 448; *Chicago & Grand Trunk Ry. Co. v. Crolie*, 33 Ill. App. 17. For samples

held to be nothing more than an index, see *Wolcott v. Lake View Building & Loan Ass'n*, 59 Ill. App. 415; *Richey v. Dunham*, 50 Ill. App. 246; *Hepp v. Jaenemann*, 23 Ill. App. 458; *Allison v. Allison*, 34 Ill. App. 385; *Farson v. Hutchins*, 62 Ill. App. 439, 442, 163 Ill. 445, 45 N. E. 297; *Shields v. Brown*, 64 Ill. App. 259.

⁴ *Mallors v. Crane Elevator Co.*, 57 Ill. App. 283, 285.

⁵ *Medley v. Mix*, 34 Ill. App. 550; *People v. Angerer*, 23 Ill. App. 450; *Meixsell v. Rich*, 66 Ill. App. 460.

⁶ *Lake v. Lower*, 30 Ill. App. 500.

⁷ *Wilson v. Dresser*, 152 Ill. 387, 38 N. E. 888; *Terre Haute, etc. R. R. Co. v. Smith*, 65 Ill. App. 101.

Justice Cartwright, of the supreme court of Illinois: "A party cannot impose upon the court the labor of reading the record by finding fault with the abstract filed, and grumbling about it does not present any question for the action of the court."¹ In case of a dispute between counsel as to what is shown by the record the judges will look into it for the purpose of ascertaining the fact, but, as a rule, they will decline to do so for any other purpose.

Another equally common mistake is that of having the matters included in the abstract shown in the same order as in the record, whereas, all matters shown in the abstract, no matter where they may be found or what their order may be in the record, should be grouped and arranged in the abstract in such order as will best present them to the court. If this duty is properly performed it will greatly facilitate the judges in their efforts to obtain a clear understanding of the issues involved, and also save much vexatious delay. "Counsel frequently complain of delay in decision and inaccuracy in opinions, but a great deal of time would be saved the appellate tribunal if a clear, complete, concise and fair abstract was handed them. Attorneys seem to expect that the judges of the courts will in a few days become familiar with the law and the facts of a case which has been the subject of months of thought and study."²

§ 548. Application of foregoing rules — Statement of case. We come now to the consideration of the brief proper, consisting of "Statement of Case," "Brief of Authorities," and "Argument." The first thing to be done, and first also in importance, especially if questions of fact depending upon conflicting evidence for their solution are involved in the appeal, is to make a thorough and exhaustive examination of the case in order to determine what are the facts established. Your own success and that of your client alike depend upon the faithful performance of this duty and the embodiment of the result in a clear, clean-cut "Statement of Facts." A writer in the "Advocate," speaking of this, says: "This is far more important than it appears to many lawyers, especially where a case is long and complicated, and where the facts, to be intelligible, must be extracted from a large mass of confused evi-

¹ Hand v. Waddell, 167 Ill. 402, 405, 47 N. E. 772.

² Andrews' Manual of Illinois Supreme Court Practice, 147.

dence and grouped together. To suppose the court will do for you what you will not do for yourself, and produce order out of chaos, is a great mistake. You must start with some clear and logical theory as to what the facts really are, for if your facts do not commend you to the appellate court, it may look with some suspicion on the relevancy of your logical conclusions, however convincing they may be.”¹ Of this Judge Dillon says: “Not only the first step, but the most important. Not only the most important, but it may surprise the legal reader to add *the most difficult*. As a result of large observation and experience, I feel obliged to say that comparatively but few lawyers understand the art of stating a cause to the court. Some have no plan at all. Some begin in the middle. Others fail to discriminate between what is essential and what is immaterial. Others are verbose and rambling.” After enlarging upon the importance of the study of the case, and every branch of it, he adds: “The statement of the case consists in the regular and logical exposition of material facts and, where necessary, showing that other facts are material. The importance of a concise but complete statement of a cause is found in the fact that perhaps nine cases out of ten are practically decided when the case is stated; and your case may be lost by the omission of even material facts in your presentation of it.”²

These remarks apply with equal force to an oral argument before the court or jury as to a printed brief. What the court or jury want in either case is a clear understanding of the facts, and this can only be obtained by means of a clear, clean-cut, logical statement. It is needless to say that it is impossible to lay down a rule applicable to every case, but as a general thing, the better plan will be to state the principal facts chronologically. Sometimes facts separated in time are closely connected; for example, they may stand to each other in the relation of cause and effect, or they may stand together as a joint cause of some other fact, or they may stand together as the joint result of some other fact or facts, in either of which cases you may find it better to depart from the chronological plan of statement. But with these exceptions, and perhaps some others, you will find that the most satisfactory way is to state your facts in the order in which they occurred.

¹The Advocate, vol. 1, p. 443.

²14 American Law Record, 54, 55.

In making your statement some points should be constantly kept in mind:

First. Remember that your statement is for the *information* of the court; therefore simply state facts without argument.

Second. Keep your theory of the case before you, and so state the facts as will make the best presentation of it to the court.

Third. Do not take it for granted that the judges know a fact because you do. Therefore make your statement full and complete, omitting nothing a knowledge of which is essential to a proper understanding of the case.

Fourth. Do not begin in the middle of your case, but begin in the right place and state facts in a clear, orderly manner easily understood by the court. You have no right to present a puzzle the solution of which would test the ingenuity of the traditional "Philadelphia lawyer."

Fifth. Last, but not least, be perfectly fair; in other words, be honest with yourself and with the court. If a fact is against you, frankly admit it and reserve your explanation for your argument. Especially, never *misstate a fact*. You have no more right to misrepresent a fact than you have to misquote an authority, and to do either will lower you in the estimation of the court, and be sure to prejudice your case.

§ 549. Application of foregoing rules — Errors relied upon.— Each of the foregoing rules provides that the appellant shall set out in his brief the grounds relied upon for a reversal. So far as I know this is the universal rule of appellate courts. The second section of the federal rule, above quoted, gives specific directions as to what the "specification of errors relied upon" shall contain, and seems to imply that this shall be done under a distinct title of the brief, but an examination of a number of briefs shows the practice is to place the "Errors Relied Upon" as a sub-title under that of "Statement of Case." The importance of the rule is apparent.

The strict enforcement of that part of the rule requiring counsel to particularly set out a specification of errors relied upon is of especial importance. It often occurs that, through abundance of caution, counsel assign many errors, which afterward they find it entirely unnecessary to refer to, and which are abandoned upon reflection, and after an examination of the

authorities upon which they intend to rely in their presentation of their case to the court. Every member of the bar understands and appreciates the necessity of concentrating and confining his own attention and investigation, as well as the attention and consideration of the court, to the crucial questions in his case. The above rule enables him to accomplish this result after he has carefully examined the authorities and considered the reasons which support his positions, and when he is best prepared to select the errors he deems of importance.

The strict and careful observance of this rule directs the attention of counsel and the court to the merits of the case presented, to the vital issues, and excludes from their consideration frivolous and immaterial questions. If the rule is observed, the arguments of counsel and the consideration of the court are concentrated upon the important questions in controversy, instead of being scattered and dissipated by the argument and consideration of numerous side issues, that, if at all material, are generally governed by the decision of the main questions, and in this way a just result is more speedily and certainly attained.¹

§ 550. Application of foregoing rules — Brief of authorities.— The object of having a brief of "points" relied upon, with a citation of the authorities in support of each, separate and apart from the argument, is thus stated by Mr. Justice Baker, of the supreme court of Indiana: "After making the statement the second part of the brief is required to be made up of the points that the appellant presents in support of each assignment of error, separately stated and numbered, and without any comment, elaboration or argument, and under each point the appellant is required to state his authorities. The purpose of this requirement is that the court may have before it in a nut-shell the results of the attorney's extended arguments. In other words, this second part of the brief, composed of the points and authorities, is a synopsis or analysis of the case that the appellant seeks to make in his argument."

Mr. Justice Cartwright, of the Illinois supreme court, in commenting upon the value of this part of a brief and its benefit to the court, says:

"It will be readily seen that a judge with a brief in hand

¹ City of Lincoln v. Sun Vapor Street-Light Co., 8 C. C. A. 258, 59 Fed. 756.

can examine the authorities with less labor and more satisfaction than if compelled to pick them out here and there from pages of argument. And in the latter situation some may be overlooked unless the court, in reading the argument, should do work equivalent to making a brief for the party, by making memoranda of the points and authorities cited. Authorities may be properly repeated, commented on and used for illustration in the argument, but they should be collected in the brief."¹

Counsel should be careful in this opening brief to specify every point relied upon, and not only state the ground relied upon, but to state it in the form he intends to stand by, because he is required to adhere to his case as made in this opening presentation. In the interest of fairness this rule should be strictly adhered to by counsel and rigidly enforced by the courts. The supreme court of Illinois hold that, under this rule, a party must abide by the case made in his opening,² and the court may refuse to consider questions raised for the first time in a reply brief.³ It is too late, as a rule, to present errors for the first time in a reply brief. Such a course is unfair to the appellee, and also deprives the court of the benefit of any argument which appellee might have made if his attention had been called to the alleged error at the proper time.⁴ The rule that new points cannot be raised for the first time in a reply brief is not, however, universally true, there being some objections which cannot be waived and, consequently, may be raised for the first time in the reply brief. Of this class is an objection to the jurisdiction which may be raised at any time.⁵ There are other cases in which the rule is relaxed in the interest of justice. In such cases the court will consider errors although the attention of the court is called to them for the

¹ Chicago Leg. News, vol. 28, p. 176.

² People v. Hanson, 150 Ill. 122, 36 N. E. 998.

³ Chicago City Ry. Co. v. Taylor, 170 Ill. 49, 48 N. E. 831; West Chicago Com'rs v. Chicago, 170 Ill. 618, 48 N. E. 1066.

⁴ Illinois Cent. R. R. Co. v. Heisner, 45 Ill. App. 143, 150; Pratt v. Trustees, 93 Ill. 475, 476, 477, 34 Am. R. 187;

Schumacher v. Bell, 164 Ill. 181, 185, 45 N. E. 428.

⁵ City of Springfield v. Coe, 166 Ill. 22, 46 N. E. 709; Bank of Minn. v. Griffin, 168 Ill. 314, 48 N. E. 154; West Chi. Park Com'rs v. Chicago, 170 Ill. 618, 48 N. E. 1066; Chicago City Ry. Co. v. Taylor, 170 Ill. 49, 48 N. E. 831.

first time in a reply brief. This will not be done, however, without giving the appellee an opportunity to reply to such new points.¹ Another branch of this rule requires an appellant to be consistent. He will not be permitted to abandon a position taken in his first brief and assume a different one in his reply.²

§ 551. **Application of foregoing rules — The argument.**— The third and final part of the brief on the part of the appellant, or plaintiff in error, is "The Argument," which, as provided by the rules, is "confined to the discussion and elaboration of the points contained in the brief." We see that, when properly constructed, there is a unity of design running through the whole presentation of appellant's case, that is, each part has its relation to every other part. Thus the abstract, where one is required, must be made with a view of presenting properly the questions involved in the appeal, that is, the errors assigned, and the same remark applies to the "Statement of the Case." The "Errors Relied Upon" are the same set out in the assignment of errors, except that those which, upon reflection, counsel has decided not to urge are eliminated, thus narrowing the controversy. The "Errors Relied Upon" govern and limit the "points" contained in the "Brief of Authorities," while the "Argument" is limited to a discussion and elaboration of the "points" raised in the "Brief."

Aside from some suggestions as to the selection and use to be made of authorities little can be said upon the subject of making an argument. What would be a proper course in one case might be wholly inapplicable to another; besides, the individuality of the writer will control the line of thought and the manner of its presentation just as it does in making an oral argument. In this and in the following sections some suggestions are offered in addition to what has been said in previous chapters³ upon the selection and proper use of authorities in making a legal argument. It is useless for me to add that, in the vast majority of cases, the reports constitute the great fountain or source from which you are to draw your legal principles. Occasionally it may be necessary to cite a statute,

¹ *Pratt v. Trustees*, 93 Ill. 475, 476-7, 34 Am. R. 187.

² *Illinois Cent. R. R. Co. v. Heisner*, 45 Ill. App. 143, 150.

³ *Ante*, §§ 312, 359-361, 473, 474.

and now and then you may use a text-book with advantage, but it is from the reported cases that the author derives his principles, and, for that reason, citing it is like using hearsay evidence when the original is at hand. Every lawyer knows that occasionally the cases cited in a foot-note fail to support the author's text, therefore cite text-books sparingly, and when you do cite them only refer to those of unquestioned authority, such as Story, Parsons, Daniell, and others of that class. In any text-book on negligence you will find it stated that one of the duties devolving upon the master is that of furnishing a safe place for his servant to work in, but if you wish to understand the principle thoroughly you must go to the reported cases for information. You will there find not only the rule but also its limitations. A powder-mill is, from the very nature of the business, an unsafe place to work, yet it does not follow, by any means, that the master is for that reason liable to his employee for an injury resulting from the carelessness of a fellow-servant in such a place. Full knowledge of the danger on the part of the servant may excuse the master from liability, and thus form an exception to the rule, while such knowledge on the part of the servant, with a promise on the part of the master to remedy the defect, may form an exception to this exception, and thus render the master liable. All these distinctions and shades of distinction which may render the master liable or excuse him from liability, as the case may be, can only be understood thoroughly by an examination of a large number of reported cases. But why multiply illustrations? Judges in their opinions, and lawyers in their briefs, alike cite and quote from the reported cases. One other suggestion may be added: If you do have occasion to quote or cite a text-book let it, as a rule, be the latest edition. I say as a rule, because there may be cases where it is better to use even an old edition. The original text is sometimes so smothered with additional sections and explanatory notes that the author himself, should he come to life, would hardly recognize his work. The sixteenth edition of Greenleaf on Evidence is a good example of this overloading of a text-book with explanatory matter. There may be other reasons why it is better for you not to cite the latest edition of a work. Daniell's Chancery Practice may be mentioned as a good example. This

excellent work is constantly used as authority in this country, and lawyers, following the general rule, usually consult the latest edition. While this may be profitable as a means of following up the later cases cited in the notes, yet the work must be used with caution, as otherwise it may mislead.

The following foot-note is copied from 21 Federal Reporter, 766, and should be remembered. In the text of the opinion the first edition of Daniell is cited, and of this the note referred to says:

"This edition is cited because it is nearest to the time when our federal equity rules were promulgated, and therefore the most reliable exponent of that practice to which we are bound by Equity Rule 90. Jones, Rules, 149; Badger v. Badger, 1 Cliff. 243, Fed. Cas. 717. All subsequent editions, including the first American, are oftentimes misleading because they are based on the second London edition, which was almost wholly rewritten to conform to the very radical changes in English practice made after our equity rules were adopted."

To the same effect Mr. Justice Bradley, in Thomson v. Wooster,¹ speaking for the supreme court, said that the English edition of Daniell's Chancery Practice, published in 1840, contained the best exposition of the practice of the high court of chancery at the time the equity rules were adopted by the supreme court (1842), and that to this book reference should be had when questions of federal equity practice arose which were not covered by the equity rules. Later editions, published after the adoption of the English Orders of 1845, and especially after the still more radical changes introduced by the Orders of April, 1850, the statute of 15 & 16 Vict., c. 86, and the General Orders afterwards made under the authority of that statute, departed farther and farther from the "present practice of the High Court of Chancery in England" — the standard adopted by United States equity rules of 1842. These later editions have a value of their own on account of their copious and valuable foot-notes, "provided one is not misled by the new portions."²

¹ 114 U. S. 104, 112.

v. Dayton Paper-Novelty Co., 91 Fed.

² See to same effect, Judge Taft in 823, 825; and see *ante*, § 162.
National Folding-Box & Paper Co.

§ 552. Application of foregoing rules — Argument — Continued.— From what was said in the last section it follows, therefore, that the most important thing in the preparation of the brief and argument is the selection and use to be made of reported cases. The mistakes or errors in this regard may be classified as follows:

First. The citation of cases without a thorough examination to see that they in fact support your contention.

Second. Overloading your brief with the citation of authorities.

Third. A failure to make a proper use of cases that are in point.

A great evil, and perhaps the very greatest, with which the upper courts have to contend is the loose and indiscriminate citation of authorities. The attorney, in search of authority to support his contention, finds a "nest of cases" in a text-book, digest, or an opinion, and forthwith, without even verifying book, page, or even the orthography of proper names, transfers the whole to his brief. The evils of this loose practice are thus pointed out by a recent writer:

"In citing authorities, you will not, of course, inflict upon the court undigested and indigestible paragraphs from the various digests, half of which may turn out on close examination to have been founded on *obiter dicta*. It does not take long for an attorney to find out that the court does not want a digest piecemeal, but a mistake that is only too common is the citing of a long list of authorities taken from all jurisdictions, and some of which have not, apparently, so far as human ingenuity can ascertain, the slightest relevancy to the particular case."¹

After being sent upon one or two "wild goose chases" by citation of authorities that have no possible bearing upon the point in question, the judges may conclude these to be fair samples of the whole lot and fail to look at your cases that are directly in point. One of the safest plans, and probably the very best, for guarding against this evil is to carefully examine again every case cited before sending your brief to the printer, and strike out every one except those which, in your honest judgment, support the proposition you are seeking to maintain.

¹ The Advocate, vol. 1, p. 448.

Judge Dillon's advice upon this matter is so excellent that it will bear quotation in full, and should be strictly followed by every lawyer who has occasion to cite an authority. He says:

"No lawyer is justified in citing a case in his brief which he has not carefully read and studied. What does this mean? It means that without a careful reading and study of the case cited it cannot be seen that it is applicable to the case in hand. . . . If the lawyer conscientiously pursues the course above indicated, viz., to cite no case in his brief until he has read it so carefully that he could himself make an accurate syllabus of it, he will avoid a most prevalent and mischievous practice — the loose and inconsiderate citation of cases. A citation of a case under a given proposition ought, unless distinctly otherwise stated, to be equivalent to an implied professional certificate that, in the writer's judgment, the case cited is an express authority in support of such proposition."¹

§ 553. Application of foregoing rules — The argument — Continued.— If you are compelled to cite a case without a personal examination of it, because the book is not at your command, have the honesty to frankly say so, telling the court where you found it; for example, "Cited by Bishop, Non-Contract Law, 264," and then, if the court, upon examination of the case, finds that it is not in point, you put the responsibility where it belongs. Another reason prompting a careful examination of your case before citing it is the danger that your opponent, by making such careful examination, will be able to show to the court that the case, instead of supporting your proposition, is in fact against it. Nothing is more mortifying than to discover that you have thus furnished the enemy with a club with which he assails you. Having made this mistake a few times one would think that a lawyer would avoid the danger of being thus "hoisted with his own petard," yet it is a matter of common observation that some attorneys never profit by such experience.²

Mr. Justice Cartwright, of the supreme court of Illinois, commenting upon this loose method of citing authorities, says:

"A judge will not go very far in examining cases in a library until he will find out on what plan the brief has been

¹ 14 Amer. Law Record, 55, 56. ² See further on this subject, *ante*, §§ 859-861.

constructed and whether it is a fraud or not. If he finds that it has been made up by citing all cases found in the notes to text-books under any statement similar to what counsel claims and from other like sources, without examination, and that most of them have no relation to the question under investigation, he is not to be much blamed if he does not continue the search very far.”¹

Another almost as equally pernicious, and certainly equally as common a mistake, and one closely akin to the above, is that of overloading a brief with authorities. This should be carefully avoided for more reasons than one. One frequently meets with briefs where more than a hundred authorities are cited in support of a well established legal proposition. Such a formidable array of material savors of pedantry, and, instead of adding force to a brief, detracts from its real strength. Remember that one well-considered case directly in point, especially when it comes from a court of acknowledged authority, may be sufficient to establish the correctness of your legal proposition, and certainly it adds nothing to its strength to cite a dozen others where the point was poorly considered, or where at best the remarks of the court were, perhaps, entirely *obiter dicta*. A juror said to the court that he had twenty reasons to account for the absence of his brother juror. “State one of them,” said the judge. “Well, in the first place, your honor, he’s dead.” “That will do,” promptly replied his honor, “you needn’t state the other nineteen reasons.”

A great secret is to learn to stop when you have said enough. In this age of stenographers and typewriters the great temptation is to say too much rather than too little. Quoting again from Mr. Justice Cartwright’s able article, we say:

“Wearisome prolixity is to be avoided, and this is a great and growing evil. The stenographer and typewriter, by removing the obstruction which the time and labor employed in writing imposed, have opened the flood-gates for verbiage, which is poured upon the trial courts in instructions and upon the courts of review in argument. In any writing prolixity is not evidence of thoroughness of examination or profundity of thought. It tends rather to obscure ideas and diminish their

¹ Briefs and Arguments that Help the Court, Chicago Legal News, vol. 28, p. 176.

force than to make them clear or easily comprehended. The greatest help to the court is to leave out the trash, and devote the argument to discussing the real questions in the case, and to applying and distinguishing the authorities and cases cited in the briefs."

§ 554. Application of foregoing rules — The argument — Continued.— To know how to make the best of authorities after you find them is quite as important as to use proper discrimination in their selection. A few well-selected cases, precisely in point, from courts of recognized authority for learning and ability, properly made use of, is ordinarily all that is necessary. We say ordinarily, because there arise, now and then, questions upon which the holdings of the courts are so divided that, in determining the "weight of authority," numbers may be reckoned as one of the elements; yet here, as in weighing the testimony of witnesses, other things are frequently of greater importance than mere numbers, and, therefore, must always be taken into consideration.¹ But, aside from these exceptional cases, the best results are obtained by making the proper use of a few well-selected cases. From these select two or three, or more if necessary, of those most in point and where the language of the court best answers your purpose, state enough of the controlling facts to show to the court that what is there said applies equally to the case in hand, and then quote fully from the opinion; that is, that part of it covering the point in question. State your facts fairly and be honest in your quotations; in other words, be just to yourself and honest with the court. By pursuing this course you accomplish two purposes — you save the court the time and labor of getting the book and finding the case, a matter of importance to the overworked judges, but, what is of more importance to you, and to them too, for that matter, you place before them the precise parts of the opinion which, in your judgment, support your contention. Follow this plan with as many cases as you deem necessary, and then add the general statement, if deemed proper, that these cases have been followed, or approved, by other courts, citing the cases. Another matter, seemingly of small importance, yet often saving the judges both time and

¹ Of the relative authority of cases and the rules for testing their value, see *ante*, §§ 359-361, 473, 474.

labor, is, in citing a case, not only to give the book and page, but the precise page where the principle is discussed. Otherwise the judge may have, practically, to read the whole case to find your point.

§ 555. **Preservation of briefs.**—The rules of every court of last resort should require the parties to file at least twenty-five copies of their briefs in each case. This is the number required by the United States supreme court rules, and the same number is required by the rules of the circuit courts of appeals and by the federal courts generally. These briefs should be required to be of uniform size, and, after retaining a sufficient number for the use of the court, at least one set from each case should be bound in volumes of convenient size, and thus preserved in the library of the court, and the remainder distributed among the principal law libraries of the state. A rule to this effect was adopted by the supreme court of Indiana, the object of which is stated by Mr. Justice Baker of that court, as follows:

“The rules require that briefs shall be of a uniform size. This might be thought an idle requirement, if the purpose were not known. It is immaterial to the court, as far as the study of any particular case is concerned, of what size the brief may be. The supreme court of the United States, and of many of the states, preserve and bind the statements of facts and arguments made by counsel. That is the purpose the supreme court of Indiana had in mind in requiring that briefs be filed of a uniform size. When these rules become operative it will be possible, and it is the intention, to have complete sets of the briefs bound, to correspond with the official volumes of the court decisions, and to have a set of the bound briefs in the law library for the use of the bar, and a set in each judge’s chambers.”

“The court was desirous of preserving for its own use and benefit, and for the assistance of the bar generally, the exhaustive and learned efforts of eminent attorneys, whose arguments are not merely useful in the particular cases in which the briefs were filed, but frequently are a compendium of the law upon the particular subject treated, which is much more thorough, learned and reliable than the treatment of the same subject in the ordinary run of text-books.”

"By keeping up a card index of these bound volumes of briefs it will be but a comparatively short time until they will be available to all persons who care to use them — a set of books containing a mine of law that it will be impossible otherwise to duplicate. Of course, no rules can be self-operative, so the full value of these modifications and changes in the old procedure will depend more largely upon the assistance and co-operation of the bar than upon the efforts of the bench."

VI. THE DUTY OF THE COURT.

§ 556. **The duty of the court — Weight given to master's findings.**— One of the duties devolving upon the upper court, in a case where questions of fact are involved in the appeal, raised by exceptions to a master's findings of fact, is that of examining the whole evidence and determining whether the master erred in making such findings, and, also, whether the action of the lower court, in approving or overruling such exceptions, was erroneous. The proper discharge of this duty involves that of determining the weight to be given to the master's findings. But first, as to the duty of examining the whole evidence. Of course, it must be understood by the term "whole evidence" is meant the whole evidence bearing upon the issues involved. As we shall hereafter see, the report of the master, on pure questions of fact, where the evidence is contradictory, and where the witnesses testified orally in his presence, especially when approved by the lower court, has every presumption in its favor and will not be disturbed except for the most cogent reasons. It is not conclusive, but, on the contrary, it is the duty of the upper court to carefully examine the whole evidence bearing on the question presented by the exceptions and promptly reverse the master, if justice demands it. Upon exceptions to the master's findings of fact the court of original jurisdiction is bound to examine the evidence and determine what are the facts. Whether that court agrees or disagrees with the master's findings, on appeal, the appellate court shall in like manner determine if the facts have been rightly found. When the appellate court is satisfied that such findings are without proofs, or material facts established by the proofs have not been found, it follows that there has been a plain mistake,

and the court should not hesitate to correct the same. In the several stages of the proceeding there is no place for a perfunctory consideration of the evidence relative to the facts in dispute.¹

In the Ontario chancery court it is held that the "parties to a cause are entitled, as well on questions of fact as on questions of law, to demand the decision of the court of appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect."² In Indiana, where the evidence is properly reported, and the correctness of the master's findings is challenged by proper exceptions, the court must review the evidence, and, if the finding is erroneous, disregard it, and pronounce the proper decision. The report of the master is in its nature advisory and may be used to assist the court, but not to conclude it. In the trial court the presumption should be that the finding of the master is correct, but if the trial court adjudges it erroneous the presumption goes down.³ By the usage of appellate courts of general jurisdiction, in England and America, it has ever been held, in the absence of express statutes to the contrary, that the findings of superior courts in chancery cases are open to review in the higher courts. Such courts have, from time immemorial, always proceeded in such cases to examine and determine for themselves the truth as to controverted questions of fact, and this must be done by the evidence contained in the record.⁴

¹ Worrall's Appeal, 110 Pa. St. 349, 362, 1 Atl. 380.

² Armstrong v. Gage, 25 Grant's Ch. R. 1, 38.

³ Bremmerman v. Jennings, 101 Ind. 253, 256; McKinney v. Pierce, 5 Ind. 422; Lewis v. Godman, 129 Ind. 359, 362, 27 N. E. 563; Stanton v. The State, 82 Ind. 463, 468.

⁴ Fanning v. Russell, 94 Ill. 386; Joliet & Chicago R. R. Co. v. Healy, 94 Ill. 416; Moore v. Tierney, 100 Ill. 207, 212; Kerfoot v. Cromwell Mound Co., 115 Ill. 502, 505, 25 N. E. 960;

Miller v. Cook, 135 Ill. 190, 201, 25 N. E. 584, 10 L. R. A. 292; Cheney v. Roodhouse, 135 Ill. 257, 262, 25 N. E. 1019; Belleville v. Citizens' Horse Ry. Co., 152 Ill. 171, 184; Goelz v. Goelz, 157 Ill. 83, 40; Ennesser v. Hudek, 169 Ill. 494, 499; Martin v. Martin, 170 Ill. 18, 28; Westerlo v. De Witt, 36 N. Y. 340, 345, 93 Am. Dec. 517; Crane v. Baudouine, 55 N. Y. 256, 264; Godfrey v. Moser, 66 N. Y. 250, 252; Sherwood v. Hauser, 94 N. Y. 626, 627; Baird v. Mayor, etc. of New York, 96 N. Y. 567, 577, 578.

§ 557. **Weight given to master's findings — Continued.**— In a former chapter the weight to be given to the master's report upon the hearing before the chancellor was fully considered, and, for that reason, it remains only for us now to consider the weight to be attached to the master's findings by the upper court. All the presumptions existing in favor of a master's findings of fact, where the evidence is contradictory and the witnesses testified orally in the master's presence, are given to such findings in the upper court the same as in the lower. The reasons in favor of such presumptions are fully stated in the chapter referred to,¹ but, at the risk of being charged with unnecessary repetition, the following additional suggestions are made:

The findings of lower tribunals, where the evidence is conflicting, based on both the hearing and inspection of the witnesses, have always and justly been considered of great weight; and only set aside for the strongest and most cogent reasons. Vice-Chancellor Strong, of the Ontario chancery court, states this rule as follows: "When there is a balance of evidence causing the determination of a question of fact to be dependent altogether on the credit to be given to particular witnesses, it is almost impossible for the court on appeal to overrule the decision of the master in whose presence the witnesses have been examined. This is a rule which, according to the very highest authority, governs, or ought to govern, all appellate tribunals."² Yet he adds that where there is "a balance of direct testimony, and the circumstances point strongly to one conclusion, and against the other, I know of no reason why the court may not review the evidence and reverse the master's findings."

In speaking of the degree of importance to be attached to the report of a master founded on conflicting oral testimony, the chancellor of New Jersey says:

"The opportunity afforded the master in arriving at a correct conclusion was much more favorable than that afforded me. It is true I have the same evidence before me upon which

¹ *Ante*, § 479 *et seq.*

² *Chard v. Meyers*, 19 Grant's Ch. R. 2 Sc. App. 58; *The Julia*, 14 Moore R. 358. He cites *Reid v. Aberdeen, Newcastle and Hall Steamship Co.*, L. R. 2 P. C. 245; *Gray v. Turnbull*, L. R. 2 Sc. App. 58; *The Julia*, 14 Moore R. 358. P. C. C. 210, 285.

the master made up his judgment. The testimony of witnesses, generally, appear all alike upon paper; and yet every one at all acquainted with the investigation of controverted facts, where the evidence is conflicting, appreciates the importance of seeing the witnesses confronted with each other, and of hearing their testimony as they give it. Where a correct decision depends upon the degree of credit to be attached to the witnesses examined, the appearance and manner of the witnesses are almost indispensable in forming a correct and satisfactory judgment. I do not mean to be understood as saying that the decision of a master should be considered as conclusive upon a matter of fact; all I mean to say is that before the court will interfere with the report of a master upon a question of fact submitted to him, depending upon the credibility of witnesses, the error of the master must satisfactorily and clearly appear. This court has always acted upon this principle, and I think it the only correct and safe one.”¹

§ 558. Weight given to master's findings — Continued.— The advantages resulting from seeing the witnesses on the stand and hearing them testify, in determining the degree of credibility to be given their testimony where the evidence is conflicting, are well stated by the supreme court of Illinois as follows:

It is within the experience of all having familiarity with the examination of unscrupulous witnesses, that sometimes the countenance, tone of voice and manner of the witness while testifying will contradict and deny the truth of the words that come from his lips, and the law does not require that the chancellor shall believe the testimony of one thus self-impeached. But no bill of exceptions or certificate of evidence attempts to or can reproduce fully and accurately the countenance, tone of voice and manner of the witness while testifying, and so it results that an appellate tribunal, having nothing but a written or printed transcript of the words to which the witnesses have testified before it, will not, where there is evidence which, considered by itself alone, is sufficient to sustain the decree, reverse merely because it may appear from the face of the record that the preponderance of the evidence does

¹ *Sinnickson v. Adm'rs of Bruere*, 9 N. J. Eq. 650, 662.

not support the decree, the witnesses having been examined orally before the chancellor on the hearing.¹

To the same effect Mr. Justice Mulkey, of the same court, says:

While the number of witnesses examined is a consideration always to be looked to, yet that of itself is by no means to be regarded as a controlling one. There are many other equally important tests of truth, chief of which is that of cross-examination in the presence of the court and jury. The witness' manner, demeanor and bearing upon the stand,—his replies, whether frank and open or reluctant and evasive,—his manner of expressing himself, whether moderate, dignified and respectful on the one hand, or extravagant, impertinent and reckless on the other,—his intelligence and means of information with respect to the matters of which he speaks,—his relations to the parties to the suit,—his interests in the question between them, or in the subject-matter of the suit,—are always of vital importance in determining to what, if any, credit the witness is entitled. These considerations are essential elements in every judicial investigation through the instrumentality of witnesses. They are among the great lights and aids that enable the court and jury to arrive at the truth, but; unfortunately, in the nature of things, most of these tests of truth that are such powerful aids to the court and jury that try the cause cannot be preserved in or transcribed upon the record of it, and, by reason thereof, they are wholly lost to a superior court when reviewing the testimony of a witness who testified in it. For this reason it has become a well settled rule that courts of error will not reverse a case merely because, in the opinion of such court, as appears from the record, the weight of evidence was against the verdict.² These remarks apply with equal force to the findings of fact by a master, in a contested case, where the witnesses were before him and testified in his hearing.

§ 559. Weight given to master's findings — Continued.— When, therefore, a question of fact is referred to the master depending upon the testimony of witnesses, conflicting in their statements and differing in their recollection, the appellate

¹ *Ayers v. Ayers*, 142 Ill. 874, 80 N. E. 672.

² *Illinois & St. L. R. R. & C. Co. v. Ogle*, 92 Ill. 853, 861, 862.

court must of necessity adopt his report, unless in case of palpable error; as, when conflicting statements are made, there is no safe method by which that court can decide between the conflicting statements seen on paper. While that court will not shut its eyes and refuse to consider legal evidence, it will not attempt to pass upon the credibility of witnesses, or the weight of conflicting testimony, and reverse the master and the trial court, except when the error is palpable and obvious, and the result arrived at is without evidence to support it, or plainly against the evidence.¹

The question as to the weight to be given to the findings of the master on matters of fact comes before the court in two different classes of cases:

First. Where the trial court overrules exceptions to the master's findings and *approves* his report.

Second. Where the trial court sustains exceptions to the report and *reverses* the master's findings.

It is the universal rule that it requires an especially strong showing to reverse the master's findings of fact where they have been approved by the chancellor. To illustrate the weight which an appellate court should give to the findings of fact by a master and their approval by the chancellor, in a case where the testimony is conflicting, the supreme court of Tennessee say:

"We have held that where, in a matter of account, the master and chancellor have agreed and the decree is in confirmation of the master's report, that the decree should not be reversed, except it clearly appears to be erroneous, and we hold that the same rule applies to the various items of account in which their findings concur. It is not sufficient to reverse the decree upon the entire account or upon any item that it does not affirmatively appear to be clearly right. It must appear affirmatively to be clearly wrong. No better illustration and propriety of the rule and its rigid enforcement can be found than the present case, and like cases, of bitterly contested partnership accounts, in which the parties differ, experts differ, and witnesses disagree, not only about the same facts, but about the showing of the same books, and in which it is not

¹ *Magarity v. Shipman*, 82 Va. 784, 787, 1 S. E. 109; *Stimpson v. Bishop*, 82 Va. 190, 204; *Sinnickson v. Adm'rs of Bruere*, 1 Stock. (9 N. J. Eq.) 659, 662.

only absolutely impossible to do exact justice, but almost so to approximate it."

"The master, with the aid of counsel, has time and opportunity to take up and dispose of the matters in the reference, item by item. Counsel may then point out the errors and omissions, after the report is prepared, and they may be corrected by the master before the report comes before the chancellor for action. If not so corrected, upon specific exceptions, each alleged error is or may be examined by the chancellor, evidence upon the particular point, *pro* and *con*, heard, argument considered, and each item disposed of after long and minute investigation. When so disposed of, and that disposition is in concurrence with the report of the master, necessarily and properly it must be treated by us with at least as much weight as the finding of a jury. Necessarily, because neither this court as a body nor its several members can give to the items of each voluminous, intricate account such a lengthy and tedious investigation."

"It is obvious that this is so from the very nature and duties of this court and the vast number of causes on its dockets. These causes it is our duty under the constitution to hear and dispose of without denial or delay, and if in the discharge of that duty we hold that no weight or insufficient weight is to be given to the results of investigations of accounts made with so much care and deliberation and subjected to so extreme a test of accuracy as is provided for in the practice described, we would do away with the very object of such method of investigation, while making it impossible to dispose of the business of this court. It is required of this court to try causes under such general rules and presumptions as will enable it to exercise the jurisdiction conferred upon it profitably to the public, and not under such disregard of them as deprives the court of the opportunity to give all litigants a hearing while it approximates a little nearer to impossible accuracy in a few cases of voluminous and intricate accounts."

"The law contemplates that these will be correctly settled by the master; if not, that his errors may be corrected in the manner indicated. If not so done, and the litigant is still dissatisfied, an appeal is provided for—not that the appellate court may go through these as if an open account, and out of

confusion make system, or perfect imperfection, but that this court, giving proper and great weight to the investigation and decree below, may correct such errors in it as clearly appear. We think this is so obvious as only to need statement for demonstration. Its necessity being apparent, the propriety of the rule is not open to question. The master sees the witnesses examined, usually knows their character, has or can have the parties and their books before him, observation of the books and his understanding of the references to them. He has opportunity, time and facilities for the most thorough inquiry and examination. As this is a duty devolved upon him by law, he is presumed to be selected with especial regard to his fitness to discharge, among his other duties, that of an accountant."

"In all respects, the reasons for treating his judgment embodied in a report with the same consideration as that of a jury in a verdict are of equal force; and in some are of greater weight, particularly his supposed special fitness and training for the specific work. The approval by the chancellor, after exceptions bringing each particular point before him for separate consideration, is of greater weight than that of a judgment refusing to set aside a verdict, because in one case difference of opinion is not so disagreeable or so costly as in the other, while the absence of observation of the testifying witnesses is more than offset by the time, opportunity and deliberation allowed for consideration of their testimony. We therefore hold that we will give to such concurrence of master and chancellor in this cause no less weight than we would to a verdict and judgment, and, in disposing of exceptions argued, so treat the decree."¹

§ 560. Weight given to master's findings — Continued.— Other courts are equally emphatic in their refusal to reverse the findings of the master after they have been approved by the court below. In a West Virginia case the court lay down the rule as follows:

Where the findings of the commissioner have been approved and sustained by the lower court, and are purely questions of fact dependent upon a mass of contradictory, parol testimony,

¹ Brown v. Dailey, 85 Tenn. 218, 1 S. W. 884.

the rule that such findings will be sustained unless it plainly appears that they are not warranted upon any reasonable view of the evidence applies with peculiar force in the appellate court. It is not the province of the appellate court to review masses of contradictory testimony, upon which any conclusion must be to a great extent unsatisfactory and conjectural. If conjectures as to the result of parol testimony have to be made in order to dispose of the case, they should be made by the commissioner and the court below, and when made they should not be disturbed by the appellate court, which has not the same opportunity for weighing such testimony. It is only when the report and the decree are plainly against the evidence that the appellate court can interfere in such case.¹

This rule has been repeatedly enforced by the same court.² The same rule is followed in Virginia. The supreme court of that state say that, where the testimony before the master is voluminous, and shows that the accounts had been running over a period of many years, and were in confusion, the report of the commissioner, who, after laborious investigation with the parties and witnesses before him, settled the accounts as best he could, will not be disturbed. In such a case the appellate court ought not to disturb the action of the commissioner and of the lower court unless there is palpable error.³ In Pennsylvania the same rule obtains. There the courts say: In cases of contested questions of fact, when such facts are directly proved by witnesses who were on the stand and gave their testimony in the presence and hearing of the master, his findings of fact are entitled to great weight, and, indeed, are held to be well nigh conclusive, "because of his superior opportunities of judging of the credibility of the witnesses and the effect of their testimony."⁴

¹ Handy v. Scott, 26 W. Va. 710, 719.

² Boyd v. Gunnison, 14 W. Va. 1, 19; Graham v. Graham, 21 W. Va. 698, 702; Handy v. Scott, 26 W. Va. 710, 718; Moore v. Ligon, 30 W. Va. 146, 157, 3 S. E. 572; Reger v. O'Neal, 33 W. Va. 159, 165, 10 S. E. 375, 6 L. R. A. 427; Hulings v. Hulings Lumber Co., 38 W. Va. 351, 370, 18 S. E. 620.

³ Stimpson v. Bishop, 82 Va. 190,

204; Stuart, Palmer & Co. v. Hendricks, 80 Va. 601.

⁴ Phillips' Appeal, 68 Pa. St. 180, 188; Warner v. Hare, 154 Pa. St. 548, 26 Atl. 240; Prouty v. Prouty, etc. Co., 155 Pa. St. 112, 25 Atl. 1001; Potter's Appeal, 158 Pa. St. 292, 27 Atl. 959; Stocker v. Hutter, 184 Pa. St. 19, 19 Atl. 427; Weaver's Appeal, 12 Atl. 812; Brotherton Bros. v. Reynolds, 164 Pa. St. 184, 30 Atl. 284; Bristol v.

In the federal courts the rule is stated as follows: Where a master finds a fact, and the evidence of such fact is contradictory, and, upon exception, the chancellor concurs with the master and disallows the exception, in the absence of very cogent evidence of a mistake of fact, or of some error of law, the finding, on appeal, must be accepted as final.¹

Where the reference to the master is by consent of parties greater weight is attached to his findings of fact than if such reference is resisted by the complaining party.² Where the court, with the consent and by the agreement of parties, appoints a master, and confers upon him "authority to hear and take all the testimony, and find all the issues of law and fact," in so far as the report of the master and the opinion of the court find facts, such findings of the master, so approved by the trial judge, are considered as conclusive upon the upper court, unless plain error be unmistakably shown from the great preponderance of evidence in the case. Especially is this true where the trial judge, in his opinion, states that he read all the evidence in order to come to an independent conclusion, and that the conclusion arrived at by him agrees entirely with that of the master.³

Other reasons are sometimes advanced in favor of the enforcement of the rule. One reason why the court upon appeal is more reluctant to set aside or modify the report of the master, where his findings have been approved by the chancellor, is because the latter knows the skill, accuracy and degree of care which the master, as an officer of his court, bestows upon mat-

Tasker, 135 Pa. St. 110, 19 Atl. 852, 20 Am. St. 858.

¹ Tug River Coal & Salt Co. v. Brigel, 30 C. C. A. 415, 86 Fed. 818, 823; Belknap v. Trust Co., 47 U. S. App. 663, 668, 80 Fed. 624; Emil Kiewert Co. v. Juneau, 47 U. S. App. 394, 401, 78 Fed. 708; Davis v. Schwartz, 155 U. S. 631, 637, 15 Sup. Ct. 287; Crawford v. Neal, 144 U. S. 585, 596, 12 Sup. Ct. 759; Evans v. The State Bank, 141 U. S. 107, 11 Sup. Ct. 885; Medsker v. Bonebrake, 108 U. S. 66, 72, 2 Sup. Ct. 351; Warren v. Keep, 155 U. S. 265, 15 Sup. Ct. 83; Cam-

den v. Stuart, 144 U. S. 104, 118, 12 Sup. Ct. 585; Tilghman v. Proctor, 125 U. S. 136, 149, 8 Sup. Ct. 894; Kimberly v. Arms, 129 U. S. 512, 524, 9 Sup. Ct. 355; Callaghan v. Myers, 128 U. S. 617, 666, 9 Sup. Ct. 177.

² See *ante*, §§ 492-495.

³ Schwartz v. Duss, 103 Fed. 561, 565, citing Bank v. Rogers, 53 Fed. 776, 3 C. C. A. 666; Kimberly v. Arms, 129 U. S. 512, 32 L. Ed. 764, 9 Sup. Ct. 355; Dravo v. Fabel, 182 U. S. 487, 33 L. Ed. 421, 10 Sup. Ct. 170.

ters committed to his charge; matters which the upper court must necessarily know less about. Even the judges of the upper court, when the character of the master for carefulness and diligence is known to them, will take it into consideration in doubtful cases, when asked to set aside or modify the master's findings.¹

§ 561. **Weight given to master's findings — Continued.**— We come now to consider the weight to be given to the findings of the master in another class of cases, that is in cases where the trial court sustains exceptions to findings of fact, in other words, cases in which the trial court reverses the master's findings. The presumption in favor of the master's findings, on disputed questions of fact, continues in the upper court notwithstanding the trial court may have reversed the master. If the trial court disregards the rule that every reasonable presumption is in favor of the master's findings, which depend on the weight of conflicting testimony, and will not be set aside unless there clearly appears to have been error or mistake, it is reversible error. The contention that the weight to be given the master's findings, on appeal, is diminished by the reversal of such findings by the trial court, is untenable. The master has many opportunities afforded, by observation, for judging of the intelligence, character and credit of the witnesses which cannot be obtained from a dry transcript of the evidence, and the court below has, in the nature of things, no better facilities for weighing and judging that testimony correctly than the appellate court has; hence the court of appeals will not hesitate to reverse the trial court if it disregarded the rule. Upon the strict enforcement of this presumption depends the value of references to masters. If the rule were otherwise, "the service of the master, now so generally employed to pass upon all the issues of fact, would be of little aid to the administration of justice."²

Where the findings of fact by a master are approved by the chancellor there can be but little difficulty in determining what is to be done. In such cases, clear error must be pointed

¹ *Clyde v. Richmond & D. R. Co.*, 69 Fed. 673. the weight to be given the master's report in both the trial and appellate

² *De Cordova v. Korte*, 7 N. Mex. 678. This is a valuable case upon courts.

out. It is not enough that there is a conflict in the testimony. In such instances the master is in a better position than either the court below, or the upper court, to weigh the evidence and decide intelligently upon it. But where the findings of a master are set aside by the chancellor, the court, on appeal, will not hesitate to set aside the order of the chancellor and sustain the findings of the master, if justice seems to require it. The judges of the upper court have equal advantage with the chancellor in determining what the facts are. In either case the testimony appears in cold type, without the benefit of having the witnesses before the court face to face.¹

Speaking of such a case, Mr. Justice Burroughs, of the Illinois appellate court, says:

"The master in chancery saw and heard the witnesses when they testified, while the chancellor who entered the decree did not; so we are in as good position to pass upon the evidence and arrive at the real transaction and intention of the parties . . . as he was." Accordingly the decree was reversed and the lower court directed to overrule the exceptions and enter a decree "in accordance with the recommendation of the master, who saw and observed the witnesses."²

Where, however, upon the hearing before the chancellor evidence is heard, the finding of the chancellor is entitled to the greater weight. In such a case the decree of a chancellor, overruling exceptions to the master's report, or matters dependent upon his own conclusions of fact from evidence produced before the latter, will not be disturbed, unless said conclusions are shown to be clearly erroneous.³ If an error is discovered in the report of the master, or in the ruling of the court thereon, such error must, in the absence of clear and satisfactory proof to the contrary, be considered an error of judgment rather than bad faith. The presumption that every man is honest and means to do right, until the contrary is shown, applies to all public officers, and especially to those occupying judicial positions. As was well said by Mr. Justice Jackson, of the Georgia supreme court, "the presumption is that every man occupying the

¹ *Mirkil v. Morgan*, 134 Pa. St. 144, 155, 19 Atl. 628.

² *Winter v. Banks*, 72 Ala. 409; *Glover v. Hembree*, 82 Ala. 524, 528.

³ *McGee v. Johnson*, 87 Ill. App. 8 So. 251, 475, 478.

exalted and responsible position of judge of the superior courts, with the eyes of an enlightened and vigilant bar ever upon him—a bar who are his judges, and by whose judgment his character, judicial and personal, will be weighed by the community—will discharge this, as every other duty—fearlessly and impartially. And the presumption is that the master so appointed, usually a member of the bar, will discharge his duties with like impartiality—seeing that he, too, is surrounded by his peers, his brethren of the bar, and that his professional reputation is staked upon his conduct in the semi-judicial character in which he is called upon to act.”¹

§ 562. Weight given to master’s findings—Continued.—In construing and reviewing the report of a master, the whole should be taken together, and if all parts of it thus considered and construed cover the case and show that it was in fact decided upon correct principles, a court of review should sustain a decree based upon it.² In a case of accounting where the report of the master is clear, careful and systematic, and where, from the whole case, the result at which the master arrived is as consonant with the evidence as a whole, and is as probably just with reference to the fixed and known data of the case as any that could have been reached, though the court is unable to see with what precise view of the evidence the master reached the result, the court will not interfere with his conclusions.³ In a case where there is clear evidence to sustain the master’s conclusions and also good evidence to sustain his report had he arrived at different conclusions, the established rule is that the findings will not be set aside.⁴

So, too, where the evidence is contradictory and the chancellor is unable to say which side is entitled to the greatest weight, the decision of the master will not be disturbed, the general rule as to burden of proof being overcome by the presumption of the correctness of the master’s findings, he having seen the witnesses on the stand and heard them testify. The master himself, however, should apply the general rule, viz.: that, the testimony being evenly balanced, the finding should

¹ Heard v. Russell, 59 Ga. 25, 48.

² Blauvelt v. Ackerman, 23 N. J.

³ Voorhis v. Voorhis, 50 Barb. 119; Eq. 495.

Pool v. Gramling, 88 Ga. 653, 16 S. E. 52.

⁴ Clark v. Condit, 21 N. J. Eq. 322. See Adams v. Brown, 7 Cush. 229.

be against the party having the burden of proof.¹ On an appeal involving questions of fact passed upon by a master or referee, the real question is not whether the judges of the upper court would have found as did the master or referee, but rather, is there clear evidence of error sufficient to reverse the finding? If it appears that the finding is not against the weight of the evidence, that it might have been either way, or that the testimony is slight upon which to base a contrary conclusion, then the fact that he saw the witnesses when testifying, and had the advantage of their presence before him while giving their testimony, must turn the scale in favor of his finding.² If the evidence as it appears in the record is evenly balanced, and if the judges can see that inferences drawn from the appearance and manner of testifying of the witnesses might turn the scale either way, then the court will assume that there were circumstances of that kind which were sufficient to convince the master or referee of the truth of the facts found by him, and in such a case his findings must be permitted to stand.³ But in case the master's report is based upon a wrong principle the court will not hesitate to set it aside. Thus in Indiana it is held that "if the principle upon which a master's report is made be erroneous, the chancellor should correct it, even without exception;" that is if it so appears from the face of the report.⁴

§ 563. Irregularities in procedure — Failure to refer to master.— A constant source of complaint in the upper courts is that of errors in procedure, either on the part of the court, the master, or both court and master. Where such errors exist and have injuriously affected the rights of the complaining party, they constitute ground for reversal, provided they have not been waived by a failure to object, by laches, or by some subsequent action of the party raising the question. Occasionally it happens that an irregularity has taken place in the proceedings which the parties are willing to waive, but which the upper court must or will insist upon. For example, the court

¹ *Rogers v. Traders' Ins. Co.*, 6 Paige, 583.

² *Westerlo v. De Witt*, 36 N. Y. 340, 345, 93 Am. Dec. 517; *Crane v. Baudouine*, 55 N. Y. 256, 264.

³ *Godfrey v. Moser*, 66 N. Y. 250, 251; *Sherwood v. Hauser*, 94 N. Y. 626, 627.

⁴ *McKinney v. Pierce*, 5 Ind. 422, 425.

may have assumed to act in a case where it had no jurisdiction of the subject-matter. In such a case the upper court must correct the error although both parties may be perfectly willing to waive it. Now and then a case occurs where the upper court is constrained to reverse a case, not upon the merits, but on the ground that the trial court erred in not referring the cause to a master, or in not re-referring the case, with further directions, because of some error committed by the latter, such as a refusal to admit proper evidence, or a failure to report upon some of the issues submitted to him, and the like. These subjects have been so fully treated in former chapters of this work that little remains to be added here. The courts hold that some cases, such as complicated matters of accounting, must be referred to a master. This is for two reasons. *First.* For the convenience of the court, the court being absolutely unable to devote the time and attention required in such a case with any consideration whatever to the other business of the court. *Second.* Because of the greater facility afforded to parties, counsel and witnesses for the investigation of such matters in the master's office. In such cases, where the lower court fails to discharge its duty by attempting to state the account without a reference, the upper court will refuse to wade through a voluminous record, but will either affirm the decree of the court below, or will reverse the cause with directions to the lower court to refer the matter to the master to state the account.¹

The proper course in such a case is to refer the cause to a master in chancery to ascertain the facts in contention between the parties on the issues made by the pleadings, and on the coming in of the report either party, dissatisfied with the conclusions reached, by filing proper exceptions, can challenge the correctness of such conclusions, and can thus have the contested questions readily determined by the court. In no other way can the facts of a case be so readily ascertained. Labor of this kind counsel will not be permitted, by stipulation or otherwise, to impose upon an appellate court. It is the appropriate work of a master in chancery. The rule of practice in this regard has been repeatedly declared by the courts and ought to be

¹ See *ante*, §§ 139, 140.

well understood.¹ This rule, as declared by the Illinois supreme court, is as follows:

"When accounts involve large sums of money, and the evidence of the parties is conflicting and unsatisfactory, in conformity with the rules of chancery practice, the cause must be referred to a master to render a concise and accurate statement of the accounts; so that the same may be readily comprehended, and any objection taken passed upon understandingly. This is the well recognized and established practice in all cases of a complicated character."²

In a case where the evidence was conflicting and of an unsatisfactory character, and there was enough in the record to awaken suspicion of the fairness of the transaction, the same court say: "We think the court below, in conformity to the well established rules of chancery practice, ought to have referred the cause to a master to take and state the accounts between the parties, and to ascertain accurately the true amount due the defendant. This is the well recognized and established practice in all cases of a complicated character, and ought to have been adopted in this case." The court accordingly reversed the decree of the court below and remanded the cause with instructions to refer the cause to a master to state the account.³

Where the correct practice is not followed by the chancellor, that is, if he attempts to state a complicated account himself, and the result is not satisfactory, the upper court will reverse the decree and remand the cause with directions to refer the cause to a master, that is, to do what should have been done in the first instance.⁴ Sometimes the upper court will reverse the decision of the court below, remand the cause, direct a reference to a master to state the account, and give minute directions as to the method of taking the same.⁵

¹ French v. Gibbs, 105 Ill. 523, 528.

² Moss v. McCall, 75 Ill. 190; French v. Gibbs, 105 Ill. 523, 528; Steere v. Hoagland, 39 Ill. 264; Bressler v. McCune, 56 Ill. 475; Riner v. Touslee, 62 Ill. 266; Groch v. Stenger, 65 Ill. 481.

³ Bressler v. McCune, 56 Ill. 475, 482. The same course was pursued in Steere v. Hoagland, 39 Ill. 264, 271.

⁴ Steere v. Hoagland, 39 Ill. 264, 271;

Bressler v. McCune, 56 Ill. 475, 482; Patten v. Patten, 75 Ill. 446, 447; Beale v. Beale, 116 Ill. 292, 5 N. E. 540; Moffett v. Hanner, 154 Ill. 642, 655, 39 N. E. 474; Dubourg v. United States, 7 Pet. 625, 626.

⁵ Tilles v. Insurance Co., 1 Martin Ch. Dec. (Ark.) 314, 326.

§ 564. **Other errors on the part of the court.**— Another error in procedure, of a similar nature to that of failing to refer a cause in a case where the reference is necessary, is that of failing to re-refer the matter to the master where the report is so unsatisfactory and the matters to be investigated so complicated as to demand a re-reference, though, in a case where all the evidence is properly taken and reported, and the findings of the master simply erroneous, it is difficult to conceive of a case where an upper court will reverse upon that ground. In a former portion of this work it has been shown that, with but few exceptions, it is always within the power of the chancellor, where the evidence is properly reported, to set aside the findings of the master and substitute his own therefor, which, if correct, will be approved by the uppercourt.¹ Yet there are cases where re-reference is necessary.² The re-reference of a cause to a master being a matter largely in the discretion of the trial court, a court of review will be slow to “put it in error” in this regard. Mr. Justice Jackson, United States circuit judge, speaking for the court of this matter, says:

“In respect to such matters as the recommittal of accounts or a reference back to a master, the chancellor exercises a very large discretion, and is not to be put in error in his action upon such motions except upon a very clear showing of merits, and in the absence of negligence.”³

Another error committed by the court in a case of a reference to a master is that of making an erroneous order of reference. For example, the order may be too broad, submitting issues not raised by the pleadings,⁴ or it may be ambiguous, and thus misleading,⁵ or the directions given in the order may be absolutely erroneous; in all which cases, if the result is an erroneous report from the master, it is the duty of the trial court to correct the erroneous order of reference and recommit the cause to the master, and, should the trial court fail to discharge its duty in this regard, it will be the duty of the upper court to correct the error by reversing the cause and re-

¹ See *ante*, § 500 *et seq.*

² See *ante*, §§ 506-511.

³ *Mosher v. Joyce*, 6 U. S. App. 107, 112, 2 C. C. A. 324, 325, 51 Fed. 441, 444. See, also, *National Folding-*

Box Co. v. Dayton Paper-Novelty Co., 91 Fed. 822, 825.

⁴ See *ante*, § 152.

⁵ *Ante*, § 153.

manding it with directions to correct the error and re-refer the cause to the master. These are given as mere illustrations of errors committed by the trial court, which, to prevent injustice, requires the upper court to reverse and remand the cause, it being impossible to do more, such errors being almost as numerous as the subjects of litigation.

§ 565. *Irregularities in the master's office not corrected by the court.*—Irregularities of procedure in the master's office frequently are of such a grave character, that, to prevent injustice to the parties, they demand correction by the trial court, and, failing in this regard, require a reversal by the upper court. Such irregularities are, as we have already seen, either corrected on appeal to the court during the progress of the hearing, as is the practice in some jurisdictions, or by motion to re-refer, as is the course pursued in others.¹

The following are given as examples of errors committed by the master which may require correction at the hands of the trial court, and, if not so corrected, then by the court on appeal:

First. The master may fail to draw the conclusions from the evidence, although required to do so by the order of reference.

When the court refers the issue to the master to examine and report as to the existence or non-existence of a fact, or to any other matter, it is his duty to draw the conclusions from the evidence produced before him and report that conclusion. He must himself draw all the conclusions of fact, leaving the question of law alone to the decision of the court.²

Second. The master may fail to consider and report upon material matters submitted to him by the order of reference.

This error may consist in a wilful disregard of the order of reference, or the order itself may be ambiguous, so that the master honestly mistakes his duty under it, or the order may erroneously direct the master not to consider a matter material

¹ See *ante*, §§ 813-820, and also *Molloy*, 54; *In re Hemiup*, 8 Paige, 305; *Sparhawk v. Wills*, 5 Gray, 423.

² *Mason v. York & Cumberland R. Co.*, 52 Me. 82, 112; *In re Hemiup*, 8 Paige, 305; *Dean v. Emerson*, 103 Mass. 480, 482, citing *Lee v. Willock*, 6 Ves. 605; *Johnston v. Reardon*, 163; also *ante*, § 393.

to the issues; and if, for any of these reasons, the master fails to consider and report upon a matter, or matters, properly in issue, and the lower court fails to correct the error, it is ground for a reversal. The judges of the upper court, in such a case, will refuse to wade through a voluminous record to determine the ultimate issues.¹

Third. Erroneous rulings of the master as to the admission of incompetent, or the exclusion of competent, evidence.

The admission of incompetent evidence upon the hearing in the master's office is no ground for reversal unless the court can see that such evidence was considered by the master in forming his conclusions, and that it probably affected the result. So, too, the exclusion of competent evidence constitutes no ground for reversing the master's findings in a case where, had such evidence been admitted, the result would have been the same. In other words, if, after considering the whole evidence, both that admitted and that excluded, the conclusion of the master is right, his findings will not be disturbed. This whole subject has been fully discussed in a former chapter, under the heading of "Harmless Error."²

Fourth. Refusing to adjourn a hearing to enable a party to introduce further evidence.

A motion for this purpose is so largely in the discretion of the master that it requires a strong showing to put him in error. It must be shown that the evidence proposed to be offered is material, and that failure to produce it sooner was not by reason of fault on the part of the party seeking its introduction.³

Fifth. Erroneously overruling an application to open up the report to enable a party to offer newly-discovered evidence.

An application for such purpose must be seasonably made before the master, the applicant must have used all diligence in the discovery and offering of his evidence, such evidence must be material and not merely cumulative,—in short, the same rule applies here as on a motion for a new trial, on the ground of newly-discovered evidence, in a suit at law.⁴

Sixth. Erroneously overruling the application of a party for leave to appear at the hearing, who is entitled to appear.

¹ Jenkins v. International Bank, 97 Ill. 568, 580.

² See ante, §§ 236-238, 498, 499.

³ See ante, § 275, also § 508.

⁴ § 276, and §§ 508, 509.

This subject, like the preceding, has been fully examined in a former chapter, rendering it unnecessary to add anything further here.¹

Seventh. A failure to give proper notice to a party who is entitled to appear before the master.

This subject also has been fully considered in a previous chapter.²

As said above, the foregoing are simply given as illustrations of irregularities in procedure, occurring in the master's office, which, if not corrected by the chancellor, may require a reversal by the upper court, but in all such cases the dissatisfied party must not waive the right to complain by his want of diligence in the master's office, and must also exhaust his remedy in the court below by a seasonable and proper application to it to correct the error. Having done so, and having secured from the trial court an adverse ruling, the proper foundation is laid for relief, which the upper court may grant, if the interest of justice demands it, by reversing and remanding the cause.

§ 566. *Final order conclusive.*—The final order of the upper court is conclusive upon the court, the master and all parties concerned. The decision of the upper court constitutes the "law of the case." After the entry of an order either overruling or sustaining exceptions to a master's report, followed by a decree confirmed by the upper court, the chancellor has no power to alter, amend or set aside the order of confirmation.³ Upon all questions presented to and passed upon by the upper court its judgment is forever conclusive upon all the parties, not only upon the court below, but even upon the upper court if the case is again brought before it by appeal. Concerning the points considered by the court in its former opinion, the discussions must be regarded as forever closed, and its decision must stand, and as to all those matters they become *res adjudicata*, and neither the lower court nor the upper court has any power to reconsider them. The rule on this subject is so well settled that it is not necessary to do

¹ See *ante*, §§ 184, 185, 186–195, 313–326, 427–431.

² See former sections referred to in note 1.

³ *Utica Ins. Co. v. Lynch*, 2 Barb. Ch. 573, 575.

more than cite a few cases where it is declared.¹ Where there is a second appeal in the same case, and the first appeal covers the merits of the controversy in all its bearings, it brings before the upper court only the subsequent proceedings had after the mandate of the court in the first appeal.² The decision of the court of last resort, having jurisdiction of the parties and the subject-matter of litigation, definite in its character, comprehending the whole merits of the controversy, is obligatory upon and conclusive as to the same parties everywhere, in the upper court as well as in all other courts. "There must be an end of litigation somewhere, and there would be none if parties were at liberty, after a case has received a final determination of a court of last resort, to litigate the same matter anew, and bring it again and again before the court for its decision."³

When the party has had his day in court he cannot, with any show of reason, ask to have another. The law provides it, to the salutary end that all litigation may be confined within certain limits, beyond which parties may not go.⁴ If the judgment pronounced, and opinion filed upon the first appeal, are not satisfactory, the only remedy afforded a party is by an application for a rehearing. A case cannot be brought to the upper court and considered in fragments. Errors occurring after the case was disposed of upon the first appeal may, of course, be inquired to, but this is the extent of a party's right.⁵

If any other course were permitted litigation would never cease. The same counsel, or if necessary new counsel, would make new arguments and present additional points for adjudication, and the most resolute persistence would finally settle the rights of the parties, and the appellate power of the court

¹ *Smyth v. Neff*, 123 Ill. 310, 313, 17 N. E. 702.

² *Walker v. Doane*, 108 Ill. 236, 246; *Newberry v. Blatchford*, 106 Ill. 584, 592; *Rising v. Carr*, 70 Ill. 596; *Hollowbush v. McConnel*, 12 Ill. 203; *Reed v. West*, 70 Ill. 479; *Smith v. Brittenham*, 94 Ill. 624.

³ *Hollowbush v. McConnel*, 12 Ill. 203; *Newberry v. Blatchford*, 106 Ill. 584, 592.

⁴ *Newberry v. Blatchford*, *supra*.

⁵ *Smith v. Brittenham*, 94 Ill. 624, 626; *Campbell v. Rankin*, 99 U. S. 261, 263; *Johnson v. Kettler*, 84 Ill. 315, 317; *Kingsbury v. Buckner*, 70 Ill. 514, 517; *Washington Bridge Co. v. Stewart*, 3 How. 413, 423; *Browder v. McArthur*, 7 Wheat. 58; *Southard v. Russell*, 16 How. (U. S.) 547; *Cromwell v. County of Sac*, 94 U. S. 351; *Davis v. Brown*, 94 U. S. 428.

would be oftener called upon to revise its own proceedings and judgment than those of the inferior courts. The court may, of course, overrule its previous decisions, but such a course would manifest a vacillation that would destroy all respect for the court.¹

Where the question, either of law or fact, is once properly brought before the upper court, and passed upon, the same question cannot be again raised in that cause either in the lower court or in the upper court, except upon a petition for rehearing.² But when the cause is reversed by the upper court and the proceedings in the lower court entirely abrogated, and the cause remanded without any further directions, the cause stands in the court below precisely as if no trial had ever occurred. The decree, by its reversal, is in effect expunged from the record; the court has the same power over the record which it possessed before its decree or judgment was rendered. It then follows that, when a decree is reversed and cause is remanded without any further directions, the lower court has the power to allow amendments to the pleadings, and to permit the introduction of other evidence.³ But when a case is considered on its merits, and every question involved is decided and the case remanded for further proceedings not inconsistent with the opinion of the court, such opinion constitutes "the law of the case," and the proceedings in the lower court must be in accordance with it.⁴

From what has been said it follows that where under a mandate of the supreme court a cause is remanded with directions to refer again to the master for a specific purpose, the further findings of the master must be based upon the decision of the supreme court, and exceptions to such findings are properly overruled, although the amount found by the master may exceed the amount claimed in the bill.⁵

¹ *Kingsbury v. Buckner*, 70 Ill. 514, 517; *Reed v. West*, 70 Ill. 479; *Ogden v. Larrabee*, 70 Ill. 510, 513.

² *Mix v. People*, 122 Ill. 641, 645, 14 N. E. 209; *Manufacturing Co. v. Wire Fence Co.*, 119 Ill. 30, 6 N. E. 191.

³ *Chickering v. Failes*, 29 Ill. 294; *Cable v. Ellis*, 120 Ill. 136, 139, 11 N. E. 188.

⁴ *City of Chicago v. Gregsten*, 157 Ill. 160, 163, and cases cited.

⁵ *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 49 Fed. 774.

CHAPTER IX.

MASTERS' SALES.

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I. MASTERS' SALES — DEFINITION — GENERAL PRINCIPLES.

§ 567. Sales by masters — Importance of duty — Definition.— One of the most important official duties devolving upon the master is that of making judicial sales under the orders of the court. The titles of property, frequently of great value, sometimes running up into the millions, are dependent upon the faithful compliance with the orders of the court; besides, the interests of owners, creditors and purchasers, and, in many cases, widows and orphans, are dependent upon the faithful discharge of his duties. Not only is the title to be vested in the purchaser dependent upon his acts, but how to make the property bring the most money, or anything like its value, and, in many cases, how to prevent its absolute sacrifice, are problems the solution of which require, not infrequently, not only good judgment but rare business tact. It is true that his general duties are outlined in the decree, yet necessarily much must be left to the discretion of the master, and contingencies constantly arise calling for its exercise. The supreme court of the United States define a sale as follows: "Sale is a word of precise legal import both in law and in equity. It means at all times a contract between parties, to give and to pass rights of property for money, which the buyer pays, or promises to

pay, to the seller for the thing bought and sold.”¹ A judicial sale is a sale made under an order of a court of competent jurisdiction directing a person named in such order to sell specific property named therein. The following are given as examples of judicial sales: A sale made under a foreclosure of a mortgage;² an administrator's sale of land under an order of court;³ a sale of land in partition proceedings, where it cannot be divided;⁴ and generally, all sales made under an order or decree of court, by a particular person named in such order, and requiring confirmation by the court.⁵

The cardinal distinction between a master's sale and a sale under an execution by a sheriff is this: In the case of a sale by a master he “is the mere instrument of the court, acts under its direction and is subject to its control, . . . and his acts, under the decree, when regular, are considered those of the chancellor, and that the biddings are not binding and cannot be enforced until approved by the court.”⁶ Hence a sale by a master under a decree of the chancellor is termed a judicial sale, while a sale under an execution is not. In a sale under a decree the court directs the sale of a specific thing, and the time, place and manner of the sale; while in a sale under a judgment by execution, the sheriff is required under the law to sell any property of the defendant which he may find which is liable to execution. In a sale under authority of a court of chancery the court is the vendor, the master being the mere agent of the court under a special delegated authority. Such a sale is a transaction directly between the court and the purchaser and may be either private or public, as the court may direct.⁷ A sheriff's sale is final and valid, if made in conformity with the law, and passes the title at once;

¹ *Williamson v. Berry*, 8 How. (U. S.) 495, 544; *Bigley v. Risher*, 63 Pa. St. 152; *Huthmacher v. Harris'* Adm'r, 2 Wright (Pa.), 491, 80 Am. Dec. 502.

² *Sturdevant v. Norris*, 30 Iowa, 65.

³ *Halleck v. Guy*, 9 Cal. 181, 70 Am. Dec. 645; *Vandever v. Baker*, 13 Pa. St. 121, 126.

⁴ *Sackett v. Twining*, 18 Pa. St. 199, 202, 57 Am. Dec. 599; *Hutton v. Williams*, 35 Ala. 503, 76 Am. Dec. 297.

⁵ *Rorer*, *Judicial Sales*, sec. 29; 12 Am. Ency. of Law, 208, note.

⁶ *Bozza v. Rowe*, 30 Ill. 198, 83 Am. Dec. 184; *Andrews v. Scotton*, 2 Bland, 629; *Williamson v. Berry*, 8 How. (U. S.) 495, 546; *Southern Bank of St. Louis v. Humphreys*, 47 Ill. 227; *Rorer*, *Judicial Sales*, 1, and cases cited in note 2.

⁷ *Harrison v. Harrison*, 1 Md. Ch. Dec. 331, 333.

whereas, in a chancery sale, the court being the vendor, the sale is not binding and conclusive until approved and ratified by the court.¹ In the case of a sale under an execution it is the law that directs the sale to be made if the money be not paid, and the law also directs the manner thereof as to notice, and sometimes also as to place and time of sale. In a sale under an execution the law appoints the officer who must conduct the sale, namely, the sheriff or constable, while in case of a sale under a decree in chancery the court names the party to conduct the sale, which may be either a master in chancery or a private person appointed as commissioner, as the court may deem best. And as the sale takes place *pendente lite*, the court may change the same at any time before the sale.²

§ 568. Object of judicial sale — Duty of the court and master.— The object of a judicial sale is the conversion of property, real or personal, into cash, that the latter may be distributed or paid out by the court to the parties entitled thereto. Therefore the sale must be for cash unless the court otherwise orders. But it is in the discretion of the court to sell upon time, if the court can see it will be more beneficial to the parties in interest.³ Judicial sales are not, in general, made on credit without consent of the parties.⁴ The sale must be for cash in hand or on a credit, and must in any event be for a money consideration; if for any other it will be but a barter.⁵ The chancellor will always make such provisions for notice and other conditions as will, in his judgment, best protect the rights of all parties in interest, and make the sale most profitable to all.⁶ The same duty rests upon the master. That is to so proceed in the discharge of his duty as to make the sale most profitable to all parties in interest, and to this end, in all

¹ Harrison v. Harrison, 1 Md. Ch. Dec. 331.

² Mullikin v. Mullikin, 1 Bland Ch. 538; Harrison v. Harrison, 1 Md. Ch. Dec. 331; Gordon v. Saunders, 2 McCord Ch. 151; Wolfe v. Sharp, 10 Rich. (S. C.) Law, 60, 63; Rorer, Judicial Sales, 18.

³ Foster v. Thomas, 21 Conn. 285; Sedgwick v. Fish, Hopk. Ch. 594.

⁴ Sedgwick v. Fish, Hopk. Ch. 594; Rorer, Judicial Sales, 93.

⁵ Sedgwick v. Fish, Hopk. Ch. 594; Reynolds v. Wilson, 15 Ill. 394, 60 Am. Dec. 753; Maples v. Howe, 3 Barb. Ch. 611; Foster v. Thomas, 21 Conn. 285; Williamson v. Berry, 8 How. (U. S.) 495, 544; Bigley v. Risher, 63 Pa. St. 152; Huthmacher v. Harris' Adm'r, 2 Wright (Pa.), 491, 80 Am. Dec. 502.

⁶ Pewabic Min. Co. v. Mason, 145 U. S. 349, 356, 12 Sup. Ct. R. 887.

matters not provided for in the order of sale, he must use his best discretion. "Officers appointed under such decrees, and directed to make such sales, have the power to accomplish the object; but they are usually invested with a reasonable discretion as to the manner of its exercise, which they are not at liberty to overlook or disregard. Acting under the decree, they have duties to perform to the complainant, to the vendor and purchaser, and to the court; and they are bound to exercise their best judgment in the performance of all those duties. Such an officer, in acting under such a decree, if directed to sell the property, should adopt all necessary and proper means to fulfill the directions; but he should, at the same time, never lose sight of the fact that, unless he is restricted by the terms of the decree, the time and manner of effecting the sale are, in the first instance, vested in his sound discretion."¹ The master in conducting such a sale is the representative of the court, as the marshal or sheriff is in an action at law. He is not under the control of either party; he is not the agent of either to make the sale; but the usual practice undoubtedly is, that he acts under the advice of the solicitor of the complainant; but it cannot be admitted that his advice is, under all circumstances, obligatory upon the officer.²

§ 569. **Master's authority.**—The primary source of the master's authority is the decree of court or order of sale, but his duties in the premises may be, and generally are, further limited, defined or qualified by statute and also by the rules of the court. Frequently the provision of the statute relating to the time and manner of the sale are embodied in the order of the court, but, whether they are or not, the statutory conditions must be strictly followed. A material departure from this course prescribed by either the statute or order will be just cause for refusing the confirmation of the court and ordering a resale.³ Where the order on its face provides the conditions upon which the master may sell, he has no discretion to exercise. His duties are defined in the order, and he must execute them accordingly. In such a case the purchaser has no reason

¹ *Blossom v. Railroad Co.*, 3 Wall. (U. S.) 349, 362; *Pewabic Min. Co. v. Mason*, 145 U. S. 349, 362, 12 Sup. Ct. R. 887.

² *Pewabic Min. Co. v. Mason*, 145 U. S. 349, 362, 12 Sup. Ct. R. 887.

³ *Reynolds v. Wilson*, 15 Ill. 394, 396, 60 Am. Dec. 753.

to complain, because he is bound to take notice of the conditions of the decree under which the officer is acting.¹ The decree constitutes the sole authority of the master in chancery to make the sale, and unless he follows that authority the report of the sale cannot be approved.² Therefore the order of the court directing a sale must be strictly obeyed. The master should keep constantly in view the fact that in making a sale he is but the ministerial officer of the court, and that, as such, he must not attempt to substitute his own judgment for that of the court. There are certain matters which the court leaves to the discretion of the master, but as to all other matters, determined by the court and fixed by the order, they must be strictly followed. If the order is ambiguous it is the duty of the master to call the attention of counsel or the court to it and ask for further directions,³ but if there is no ambiguity in the order, if its terms are definite and certain, the only duty of the master is to execute it.⁴ Especially where an order of sale is made in a proceeding, where the court is acting under the provisions of a statute, the conditions of the order must be strictly followed. Thus, in a sale of land to pay debts of a decedent, where the court directed the executor to give six weeks' notice of the time and place of sale, the executor gave but four weeks' notice. The court vacated the sale, applying the general principle of law "that where special proceedings are authorized, by which the estate of one may be divested and transferred to another, every material step in the course of the proceedings must be followed."⁵

¹ Reynolds v. Wilson, 15 Ill. 394, 396, 60 Am. Dec. 753; Moffitt v. Moffitt, 69 Ill. 641, 643; Frazier v. Steenrod, 7 Iowa, 339, 71 Am. Dec. 447.

² Quick v. Collins, 197 Ill. 391, 64 N. E. 288; Jacobus v. Smith, 14 Ill. 359; Reynolds v. Wilson, 15 Ill. 394, 60 Am. Dec. 753; Sowards v. Pritchett, 37 Ill. 517.

³ See ante, §§ 153, 160.

⁴ Walker v. Schum, 42 Ill. 462; Welch v. Louis, 31 Ill. 446; Meeker v. Evans, 25 Ill. 322; Vanbussum v. Maloney, 2 Metc. (Ky.) 550; Blakey v. Abert, 1 Dana (Ky.), 185; Nebraska

L. & T. Co. v. Hamer, 40 Neb. 281, 58 N. W. 695; Hooper v. Castetter, 45 Neb. 67, 63 N. W. 133; Babcock v. Perry, 8 Wis. 277; Wiley v. White, 3 Stew. & P. (Ala.) 355; Williamson v. Williamson, 3 Smedes & M. (Miss.) 715, 41 Am. Dec. 636. In regard to asking for more specific instructions where the order is uncertain or ambiguous. See Union Sugar Refining Co. v. Mathieson, 3 Cliff. 146, Fed. Cas. No. 14,398.

⁵ Reynolds v. Wilson, 15 Ill. 394, 60 Am. Dec. 753.

As the master is expected to follow the directions of the decree implicitly, he must be careful to ascertain its requirements and then obey them to the letter. "No departure from the manner in which a sale is directed to be made, either under a judgment at law or a decree in equity, is permitted."¹ This is important, because "the master is the mere instrument of the court, acts under its directions, and is subject to its control."² While this is true, yet it is also true that there are but very few irregularities, or departures from the directions given by the chancellor, which form insuperable objections to a confirmation of the sale. Regarding the master as the agent of the court in making the sale, it would seem to follow, necessarily, that, though he may depart from the special directions of his principal and thus exonerate the latter from the obligation to confirm his act, yet, if it thinks proper to do so, the act of the agent will be as binding as if the latter had pursued, in all respects, those directions; a subsequent ratification of the act having the same effect as a previous authority. The court, it is true, must take care, in confirming the act of its agents who have not followed the directions given, that no injustice is done the parties interested, and that they have an opportunity to be heard before their rights are decided upon. But if, after this is done, the court is satisfied that justice requires the ratification of the sale, there is no principle which forbids it, though the master may not have observed those formalities which were prescribed for him.³

Hence it has been held that the fact that the sale was made on a different day and at a different place from those mentioned in the notice constituted no valid objection to the confirmation of the sale.⁴ Of course, this could only be done in a case where the property was sold for its full value and, therefore, no injury done to the parties interested. Yet there are irregularities which have been held to absolutely forbid the confirmation of the sale. For example, in a case where the master, being sick, did not attend the sale, but deputed a competent agent, who attended and sold the land, it was held good cause

¹ *Williamson v. Berry*, 8 How.(U.S.) 495, 544.

³ *Harrison v. Harrison*, 1 Md. Ch. Dec. 831-888.

² *Bozza v. Rowe*, 80 Ill. 198, 83 Am. Dec. 324.

⁴ *Id.*

for setting aside the sale, Chancellor Kent remarking, "If he had been present, and had employed an auctioneer or crier, it would still have been his sale, and the parties would have had all the benefit of his superintendence and judgment. But to allow such a sale as this to stand, would open the door to a very lax and dangerous practice."¹

As one of the first duties of the master is to ascertain the requirements of the decree, it follows that he should be clothed with a copy of the order or decree, duly authenticated, designating the land to be sold and the terms of sale;² but, if a sale is otherwise regular, and in conformity to the decree, it will not be adjudged void because a copy of such order or decree was not furnished to the master.³ Yet a sale made on receipt of an informal order, omitting the description of the land and not directed to any one, though not actually void, will be set aside for irregularity on proper application.⁴

II. TIME AND PLACE OF SALE AND NOTICE THEREOF.

§ 570. Fixing time and place of sale.—The place of sale is usually designated in the decree, but the time is generally left to the discretion of the master. It is the duty of the officer directed to make a sale of property, under a judgment or a decree of court, to put it up for sale at such a time and under such circumstances as to make it bring the best price, without injuring the party entitled to the proceeds of the sale by delaying the payment of his debt. This duty must be carefully observed by the master, because if, in violation of his duty, he is proceeding to sell property, under a decree in chancery, at an improper time or under improper circumstances, when such sale must necessarily result in a sacrifice of the property, as during the raging of a pestilence, or while there is a threatened invasion, which will destroy all chance of fair competition by deterring bidders from attending the sale, it will unquestionably be the duty as well as the right of

¹ *Heyer v. Deaves*, 2 Johns. Ch. 366; *Insurance Co. v. Hallock*, 6 Wall. 556.

² *Rorer*, Jud. Sales, § 555.

⁴ *Rhonemus v. Corwin*, 9 Ohio St.

³ *Rhonemus v. Corwin*, 9 Ohio St. 366.

the chancellor to interfere.¹ Yet a court of chancery has no legal right to interfere for the relief of an individual by arbitrarily suspending the ordinary operation of the laws for the collection of debts to meet his particular case.² But the mere existence of war, as a national calamity, may not justify the master in postponing the day of sale, and to thus interrupt the regular administration of justice and the collection of debts. If it is true that there is an immediate calamity, present or impending over the place where the sale must be held, such as an invasion by the enemy, or extreme sickness, which would suspend all business, the master ought to postpone the day of sale, and, in such a case, if he does not, the chancellor, upon proper application and supported by proof of the facts, will interfere to prevent a sacrifice of the property.³ The "present unsettled state of the politics and finances of the country" constitutes no ground for postponing a master's sale, under the "vain expectation that an extra session of congress" may afford relief by enhancing the value of property.⁴

If a party has knowledge of the fact that the master is about to sell at a time or place, or under such circumstances, as will probably result in a sacrifice of the property, he should promptly make his application to the court for an order postponing the sale, because the ground relied upon may be sufficient to justify the court in making an order to stay the sale, but wholly insufficient to justify setting the sale aside after it is made. Where a party, with full knowledge of the facts, takes his chances by allowing the sale to take place without objection, he is, in justice, required to make a much stronger showing to obtain relief than if he had used proper diligence by making his application before the delay and expense of a sale. For example, the fact that a sale is proposed to be made in a time of great financial distress in the country, and that it will probably result in a sacrifice of the property, may be good cause for postponing the sale; but the fact that property has been sold for

¹ McGown v. Sandford, 9 Paige, 290.

² Id.

³ Astor v. Romaine, 1 Johns. Ch. 310. This was an application to Chancellor Kent, in 1814, to postpone a master's sale on the ground

of a threatened invasion of the city of New York by the British forces, and, upon the showing made, the sale was postponed for eight weeks by the chancellor. See *post*, § 609.

⁴ McGown v. Sandford, 9 Paige, 290.

less than its value in a time of financial distress may not be good ground for vacating a sale, especially if the complaining party has, by appeal from court to court, and by strenuous and protracted resistance, himself delayed the sale for years. Under such circumstances the court will look into the history of the case to see what the complaining party may equitably demand of the court.¹

The place of sale is equally as important as the time. When fixed by the order of court, as it usually is, the master has no discretion, but it is his duty, in such case, to see that his notice carefully conforms to the order, and it is useless to add that it is his duty to sell at the place named in the notice. If the place of sale is not determined by the court and specified in the order, and is, therefore, left to the discretion of the master, it is his duty to fix upon a place convenient to the public and accessible to bidders, the prime object being to secure competition, and by so doing obtain the best possible price for the property.²

§ 571. Notice of sale—What it should contain.—A sale at public auction implies the necessity of notice, that those desiring the property may be brought together to compete with each other for the purchase of the same. To accomplish this purpose, the notice must be sufficiently definite as to the time and place of sale, and, in addition to this, it should describe the thing proposed to be sold. Without a knowledge of the time and place it is impossible for parties to attend who desire to buy, and without knowing what is to be sold they cannot determine whether they desire to attend. Freeman says that “the object of this notice is too obvious to require any detailed description. It is designed to inform the general public of the kind and character of the property to be sold; of the time, place, and terms of the sale, and of the persons whose interests are about to be subjected to an involuntary transfer.”³

To determine his duty in this regard, the master must carefully consult:

First. The decree of sale, which usually fixes the place of sale, and, in addition, ordinarily contains specific directions relative to the notice to be given.

¹ *Pewabic Min. Co. v. Mason*, 145 U. S. 349, 356, 360, 12 Sup. Ct. R. 887.

² *Trustees v. Snell*, 19 Ill. 156.

³ *Freeman on Executions*, sec. 285a.

Second. The master must also carefully examine the statute, if there be one upon the subject, that he may ascertain and follow its requirements. There should be no conflict between the directions given in the decree and those found in the statute, and, in case there is, the master should call the attention of the court to the fact, that the error may be rectified.

Third. In addition to this, the master must consult and follow the standing rules of the court, if any, upon the subject, because such rules are orders of the court, to which the master must yield obedience.¹

Fourth. The rule in regard to notice, like that applied to all other duties of the master, is that, as to all matters not provided for by the decree, statute, or rules of court, that is, as to all matters left to his discretion, he must exercise his best judgment and act with perfect fairness to all parties interested, and especially with the view of making the property sell for the best price.²

Although the statute may require notice to be published for a given length of time, yet the court may, in its order, require it to be published for a longer period; also the court may provide for its publication in a particular newspaper, or in more than one, and such do not conflict with the statute. When the order on its face provides that the master may sell after giving notice for a given period, named in the order, he has no power to sell until such notice is given, and if he fails to give such notice the sale will be invalid.³ Where the decree and statute both provide the conditions upon which a sale may be made, the master cannot violate both and still expect the court to confirm his sale in a case where exceptions are taken.⁴ Where the notice required in chancery sales is not provided by statute, "the time of advertising, the manner thereof, and the terms of sale, are all within the discretion of the court granting the decree, and the officer must conform to the decree, whatever it may be."⁵ In other words, in the absence of a controlling statute, a court of equity, under its general chancery powers, may direct what and how notice of a judicial sale shall be given,

¹ *Ante*, §§ 167-171.

³ *Reynolds v. Wilson*, 15 Ill. 394.

² *McGown v. Sandford*, 9 Paige, 396, 60 Am. Dec. 758.

290; *Dempster v. West*, 69 Ill. 613, 619.

⁴ *Moffitt v. Moffitt*, 69 Ill. 641, 648.

⁵ *Gould v. Garrison*, 48 Ill. 258.

the only limitation upon that power being that such notice must be reasonable;¹ but, whatever the provisions of the decree may be, the master must obey them.²

When the court has exercised its judicial discretion as to time and manner in which notice of the sale shall be given, the master has no discretion, but is bound to execute the decree as made. In such a case it is essential to the validity of the sale that notice shall be given as directed, and, where objection is made in apt time, the court has no power to approve the sale if notice has not been given as required by the decree. The decree constitutes his sole authority for making the sale, and, unless he follows that authority, the sale cannot be approved.³ It is true that a court of equity, having regard to the stability of judicial sales, will not always interfere to vacate them for want of a strict compliance in the matter of notice, after the lapse of a considerable time; and, in a case where no objection was made to the manner in which notice was given for ten years and nine months after the sale was approved, it was held that the court should not set the sale aside unless positive injury was shown.⁴ But where the objection is urged on the filing of the master's report, before confirmation, the sale will not be approved if notice has not been given as required by the decree.⁵

§ 572. Notice of sale — What it must contain — Continued.— The three important and essential elements of every valid notice are *time*, *place*, and *description* of property. The rule is universal that without each of these is properly specified and set out, the notice will be held to be insufficient. They constitute answers to the three questions — when? where? what? When will the sale take place? Where will it be? What is to be sold? The time of the sale being essential, it must be stated with sufficient accuracy to enable bidders to know when to be present. Any ambiguity in this regard, calculated to deceive or mislead the public, will defeat the

¹ Crosby v. Kiest, 135 Ill. 458, 460, Dec. 753; Sowards v. Pritchett, 37 Ill. 517.

² Ante, §§ 160-168.

³ Quick v. Collins, 197 Ill. 891, 894; Jacobus v. Smith, 14 Ill. 359; Reynolds v. Wilson, 15 Ill. 894, 60 Am.

⁴ Garrett v. Moss, 20 Ill. 549; Quick v. Collins, 197 Ill. 891, 894, 64 N. E. 288.

⁵ Wilson v. Ford, 190 Ill. 614, 60 N. E. 876; Quick v. Collins, 197 Ill. 891, 394, 64 N. E. 288.

object of the notice and render it insufficient. Where a mistake in naming the day is one calculated to mislead, such as giving not only the day of the month but also the day of the week, and doing this in such a manner that one or the other is wrong, it will invalidate the sale, the public, in such a case, having no means of determining upon which day the sale would actually take place.¹ But, where the mistake is obvious and the actual time of the sale can readily be determined by inspection of the whole notice, a different rule applies. Thus where the notice, dated September 15, 1861, stated that the sale would take place on December 6, 1761, it was held that the mistake did not invalidate the sale;² but if the mistake is such that any one can be misled by it, or such as to render the day of sale doubtful or uncertain, it is ground for invalidating the sale.³ For example, a notice of sale was dated January 21, 1858, and stated that the sale would take place on February 12th. The notice was published in a paper issued in January, 1859, and the notice should have been dated January 21, 1859, as the sale was intended to take place, and did take place, on February 12, 1859. The court held that, as the notice was dated January, 1858, it would naturally point to the succeeding month of February; and those who read it would naturally suppose it to be an advertisement of a sale of the past year; continued inadvertently, or published by mistake.⁴

Freeman says "that it would seem that the notice ought to name the very hour at which the sale will commence, so that persons having any inclination to attend will not be deterred from doing so by the fact that they might be kept waiting during all the business hours of the day."⁵ The authorities, however, hold that a sale made under a notice that it will take place between certain business hours will not be disturbed if the sale is otherwise regular.⁶ Notwithstanding this fact, it is better, as stated above, for the master to name a certain hour for the sale, and, having designated a particular day and hour,

¹ *Wellman v. Lawrence*, 15 Mass. 326; *Thayer v. Roberts*, 44 Me. 247; *Thacker v. Tracy*, 8 Mo. App. 315.

² *Jensen v. Weinlander*, 25 Wis. 477, 479.

³ *Id.*

⁴ *Fenner v. Tucker*, 6 R. I. 551.

⁵ *Freeman on Executions*, sec. 285c.

⁶ *Trustees v. Snell*, 19 Ill. 156, 68 Am. Dec. 586; *Burr v. Borden*, 61 Ill. 389; *Northrop v. Cooper*, 23 Kan. 432.

it is the duty of the master to be there, in person, at the time named, and either make the sale or, in case that cannot be done, adjourn to another day and hour.

This matter is sometimes provided for by statute. Thus, an Illinois statute provides that, in case of sales under executions, the sale must take place "between the hours of nine in the morning and the setting of the sun of the same day," and, further, that the notice shall specify the particular hour of the day at which the sale shall commence.¹ But it is held that this provision has no application to sales made under decrees of courts of chancery.² But, however loose the practice may be in this regard, a notice which simply specifies that a sale will take place on a particular day without naming the hour, or that it will take place between certain hours, is held to be insufficient. Thus, where a notice stated that the sale would be on "the 2d day of January next," and the property was sold at a great sacrifice, the sale was set aside on the ground of insufficiency of notice. Under such a notice the sale might have been made immediately before midnight on the day named, and, if so made, it was voidable. The object of the sale is, by fairness and competition, to sell the property for its full value. This can, as a general rule, only be done by making the sale at a convenient public place accessible to bidders, and at the ordinary business hours of the day; hence, the notice must state the hour of sale, or that the sale will be made between certain named hours of the business portion of the day named.³

§ 573. Notice of sale — What it must contain — Continued.— The object of a public sale is, by fairness and competition, to evolve the full value of the property, and to produce that value in the form of money;⁴ hence, no matter whether the place of sale is designated by statute, fixed by the order of court directing the sale, or left to the discretion of the master, it should be specifically and definitely stated in the notice of sale. This information can only be given by carefully specifying the place in the notice. Freeman, in his excellent work

¹ Rev. Stat., ch. 77, sec. 14.

³ Trustees of School v. Snell, 19 Ill.

² Crosby v. Kiest, 135 Ill. 458, 462, 156, 68 Am. Dec. 586.

26 N. E. 589; Springer v. Law, 185 Ill. 542, 57 N. E. 435.

⁴ Trustees v. Snell, 19 Ill. 156, 68 Am. Dec. 586.

upon Executions, justly observes that it would be a vain act to give notice that certain property would, at a time named, be exposed to sale at public auction, and yet leave the public in ignorance of the place where their presence would give them the privilege of bidding at such sale.¹ A notice without designating the place of sale is no notice at all, such omission entirely destroying its value, and a sale made in pursuance thereof has no greater validity than if made without any notice whatever.²

The specification of an impossible place, or a place that has no existence, is the same as a failure to name any place whatever.³

The question sometimes arises as to the degree of precision required in specifying the place of sale. An answer to this question, in a general way, is that the notice in this regard must be reasonably definite; that is, the place of sale must be designated with such certainty that a man of ordinary intelligence can readily locate it without any other information except that derived from the notice. Tested by this rule, it may be stated that it is not necessary that the notice should specify the precise spot at which the sale will be made. For example, it has been held that a notice that a sale will take place at the "court-house in the city of St. Paul" is sufficient, without naming the apartment or precise spot.⁴ So, too, it was held that a notice that a sale would take place in a small town, naming it, containing only about five hundred inhabitants, the chief business of which was limited to two blocks, was sufficient, it appearing that the sale took place adjacent to these blocks and was well attended.⁵

§ 574. Notice of sale—What it must contain—Continued.—The object of a notice of a public sale is to bring together, at a time and place named, all persons in the vicinity who are desirous of obtaining property of the kind to be sold, that they may compete with each other for its purchase, and, by so doing, convert such property into money at its fair

¹ Freeman on Executions, § 285d.

² Blodgett v. Hitt, 29 Wis. 169;
Burnet v. Denniston, 5 Johns. Ch.
35, 42.

³ Bottineau v. Aetna Life Ins. Co.,
31 Minn. 125.

⁴ Golcher v. Brisbin, 20 Minn. 453.

⁵ Beatie v. Butler, 21 Mo. 313, 64
Am. Dec. 224.

value. It is obvious that this object cannot be attained unless such notice, in addition to designating the time and place of sale, shall contain a reasonable description of the property to be sold. Without such description few persons might attend, and, of the number so attending, perhaps there might not be a single one desiring the kind of property to be sold. It is obvious, therefore, that the notice of sale should specify the kind of property to be sold, and it follows that, to accomplish its purpose, it is just as obvious that this description should be made in a manner best calculated to inform the public as to the "location, extent, character and value" of the property.

The description of the property required in the notice of sale may serve a double purpose, as follows:

First. The identification of the property to be sold, and,—

Second. The furnishing of information to the public as to its character, qualities, or any other facts calculated to enhance its value or attract the attention of purchasers.

For the accomplishment of the first purpose it is held to be sufficient and proper if the notice follows the description found in the mortgage.¹ But, while it is frequently said that it is sufficient to follow the description given in the mortgage, trust deed, or bill, such statement must not be understood as applicable to all cases, otherwise it may lead to error. In case there are special features identifying the property, it is better, perhaps, in all cases to mention them, because as is well known, few persons are acquainted with the legal description of their neighbor's property; indeed the statement may be made stronger still, as it not infrequently happens that men are unable to give the legal description of their own property. There are cases where it would be highly improper for the master to content himself with the description found in the bill. For example, in the case of foreclosure of a mortgage upon a lot upon which there is a steam-mill or a hotel, the description given in the notice of sale should describe the property particularly, in order that it may attract the attention of parties desiring that kind of property, and, in case of a failure so to do and the property should sell for an inadequate price, it

¹ Robinson v. Amateur Ass'n, 14 Beek v. Bank of Smyrna, 5 Houst. S. C. 148, 153; Model Lodging House 120, 122.
Ass'n v. Boston, 114 Mass. 133, 138;

would constitute good ground for setting the sale aside and ordering a resale under a proper notice.

The object of the notice is to inform the public what property is to be sold, to prevent its sacrifice and to afford the owner an opportunity to redeem it from sale.¹ Hence the notice should of itself contain sufficiently definite terms of description, without further reference, to apprise the public of the property to be sold, the authority by which it is sold, a description thereof, full enough to be understood by the public, its popular name, if any, its proximity to other known property, the name of the occupant at the time, or any other prominent characteristics, all or either of which may afford means of information to the public, and others concerned, of the identity of the property.² The description of the property to be sold ought to be sufficiently detailed and definite as to convey to the public, in the best manner, information as to the location, extent, character and value of the property. Hence, if there are special features, enhancing the value of the property, they ought, in fairness to the parties interested, to be stated in the notice, and a failure so to do has, in some of the states, been held to be ground for setting aside the sale.³ Especially will the court seize upon irregularities of this character as ground for setting aside the sale where there is great inadequacy of price and the court is asked to vacate the sale upon that ground.⁴

Jones says that the notice in this regard "should be drawn with fairness both to those who are interested in the property and to those who may purchase it, and should neither contain uncalled for statements calculated to depreciate the price unduly,⁵ nor, on the other hand, should it contain statements which might unduly enhance the price or mislead the purchaser."⁶ Any false statement made in the notice, calculated to mislead the public and deter bidders, will, of course, be ground for vacating the sale. For example, a false assertion

¹ *Kauffman v. Walker*, 9 Md. 229; *Carroll v. Hutton*, 88 Md. 676, 682, 41 Atl. 1081.

² *Carroll v. Hutton*, 88 Md. 676, 682, 41 Atl. 1081.

³ *Freeman on Executions*, sec. 285b.

⁴ See *post*, §§ 599, 601-603.

⁵ *Marsh v. Ridgway*, 18 Abb. Pr. 262.

⁶ 2 *Jones on Mortgages*, sec. 1612, citing *Veeder v. Fonda*, 3 Paige, 94.

as to the amount of incumbrance upon the property, where it is sold subject to incumbrances, is a fraud upon the public and one calculated to prevent competition, and, therefore, constitutes ground for setting aside the sale.¹ What is required in the notice is a simple statement of facts. Any undue exaggeration will afford ground for relief to a purchaser who has been misled thereby. The maxim *simplex commendatio non obligat*, applied in cases where the vendor and purchaser are dealing at arms' length, has no application to sales at auction, where the officer conducting the same is, in law, considered as the agent of both buyer and seller. The master, or other officer conducting the sale, should bear in mind the fact that many a notice of sale has been held defective because it contained too little, and that there is no danger of it being condemned for containing too much, provided there is nothing in it calculated to mislead. The judicious master, anxious to faithfully discharge the duty imposed upon him by the court, should do whatever an honest, cautious and prudent private individual would do if engaged in selling his property at a voluntary auction sale.

§ 575. Notice of sale — What it must contain — Continued.— Other matters may, and in many cases should, be inserted in the notice of sale, but, as to most of such matters, the holdings of the courts are so conflicting, or the practice so variant in different jurisdictions, that no general rule can be given relative thereto. For example, it is said that there is no rule of law, and no rule in the court of chancery, rendering it absolutely necessary that the title of a cause should be inserted in a notice of sale under a decree; but it is proper that such title should be briefly stated in the notice for the purpose of attracting the attention of the parties who may be interested in the premises.² Two other good reasons may be added: The title of the suit furnishes to those who are acquainted with the parties, additional information as to the identity of the property to be sold, and also gives to parties desiring to purchase an opportunity of examining into the proceedings to determine their regularity, and, by so doing, ascertain the character of title to be obtained by purchasers at the sale. The

¹ Burnet v. Denniston, 5 Johns. Ch. 34.

² Ray v. Oliver, 6 Paige, 489.

general practice is to give the title of the cause, and in some of the states this is required by statute. In Illinois it is provided that, in case of sales of real estate under execution, the notice of sale shall specify "the name of the plaintiff and defendant in the execution,"¹ but it is held by the courts of that state that this provision has no application to chancery sales.² In New York and California the notice is not required to state anything "except the time and place of sale, and a description of the property to be sold," and need contain no allusion to the parties or to the judgment.³ In a recent Illinois case it was held that it is not necessary for a published notice of sale to state the amount due or necessary to be raised under the decree of sale, but such notice is sufficient if it gives the title of the cause, and the date of the decree, which shows the amount of the indebtedness, and states that the sale is made in pursuance of such decree. Such a notice furnishes all the necessary information on that point.⁴ The law does not require a master's notice of sale to specify that the sale is to be made subject to a lien. That fact being specified in the decree of sale is notice to all the world, and all persons claiming through or under it are presumed to have known its terms and are bound by its provisions.⁵

As to the method of giving notice, it is generally provided by statute, or by the decree of court ordering the sale, one or both, that the notice shall be published for a given length of time in some newspaper published in the county; but the details are so variant in the different jurisdictions, and decisions so numerous, that all that can be done here is to refer the reader to the sources of information, viz.: the decree of the court, the statutory provisions of his state, and the decisions of the courts construing the same. In the absence of a statutory provision there is no law requiring the officer conducting a public sale to give a personal notice to any of the parties to the suit, or to any one interested in the sale. In some of the states statutory provisions require personal notice to be

¹ Hurd's Rev. Stat., ch. 77, sec. 14.

⁴ Springer v. Law, 185 Ill. 542, 57

² Crosby v. Kiest, 135 Ill. 458, 462, N. E. 435.

26 N. E. 589.

⁵ Hughes v. Frisby, 81 Ill. 188,

³ Chapman v. Morrill, 19 Hun, 318; 192

Freeman on Executions, sec. 285a.

given to the defendant, under certain conditions; in some jurisdictions, if he is a resident of the county; in others if he is in actual occupation or possession of the premises; and in still others, if the officer shall find the defendant in his precinct.¹ But, as already said, in the absence of a statutory requirement no such duty devolves upon the officer. In a recent Illinois case it is held that the fact that no personal notice was given to the mortgagor, in accordance with an alleged promise of the master, and that the property sold for an inadequate price, are no grounds for refusing a confirmation of the sale, since the right of redemption gives the mortgagor the same benefit as if he had been present and bid in the property at its full value.²

§ 576. Notice of sale — Form of.— Unless some more definite description of the property is required, in order to notify the public as to its particular character, the notice of sale may be as follows:

Master's Sale.

STATE OF ILLINOIS, County of Cook.	} ss.	Circuit Court of Cook County. In Chancery.
James M. Parker v. George W. Rogers, Maria J. Rogers and Henry S. Robinson, Trustee.		

Public notice is hereby given that, in pursuance of a decree made and entered by said court, in the above entitled cause, on the sixteenth day of October, A. D. 1902, I, Wm. Fenimore Cooper, master in chancery of the said circuit court of Cook county, will, on Tuesday, the sixth day of January, A. D. 1903, at the hour of eleven o'clock in the forenoon, at the judicial salesrooms of the Chicago Real Estate Board, Number 57 Dearborn street, in the city of Chicago, county of Cook, and state of Illinois, sell at public auction, to the highest and best bidder for cash, all and singular the following described premises and real estate in said decree mentioned, situate in the county of Cook, and state of Illinois, or so much thereof as shall be sufficient to satisfy said decree, to wit: Lots nine (9) and ten (10), in Ward and Moreland's Addition to Chicago, being a subdi-

¹ 12 Am. Ency. Pl. & Pr. 27, and cases cited.

² Springer v. Law, 185 Ill. 542, 57 N. E. 435.

vision of the east half (E. $\frac{1}{2}$) of the northeast quarter (N. E. $\frac{1}{4}$) of section fifteen (15), township thirty-nine (39) north, range thirteen (13) east, of the third principal meridian.

Dated, Chicago, Illinois, November 18, A. D. 1902.

WM. FENIMORE COOPER,

Master in Chancery of the Circuit Court of Cook County.

JOHN G. THOMPSON,

Complainant's Solicitor.

III. CONDUCTING THE SALE.

§ 577. Time and place of sale.— The notice required by the statute or decree having been properly given, nothing further remains to be done by the master, or other officer, charged with the execution of the order of the court, until the day of sale arrives. Assuming that this has been properly done, we come now to an examination of the master's duties in conducting the sale. The first thing to be noted is that, unless otherwise ordered by the court, the sale must be at public auction to the highest bidder.¹ Where power is given to a trustee, by the terms of a mortgage, to sell the property mortgaged in case of default in payment of the debt, such power cannot be by him delegated to any one else, the presumption being that the party selected to act as such trustee was so selected because of special trust and confidence placed in him.² For the same reason a master in chancery, or other officer charged by the court with the duty of selling property under its direction, cannot delegate the authority vested in him to another, and this too for another reason, which is perhaps a stronger one — such officer acts under his official bond and oath of office. From what has been said it follows that the personal presence of the master is required at the sale.³ His presence is required in order that the parties interested may have the benefit of the discretion and judgment which he

¹ Freeman, *Void Judicial Sales*, 442; *Flower v. Elwood*, 66 Ill. 488, § 32; *Rorer, Judicial Sales*, § 340; 2 449.
Jones on Mortgages, § 1638.

² *Thornton v. Boyden*, 81 Ill. 200; *Blossom v. Milwaukee, etc. R. Co.*, 8 Wall. 196; *Chambers v. Jones*, 72 Ill. 275; *Galbraith v. Drought*, 24 Kan. Dec. 562; *Taylor v. Hopkins*, 40 Ill. 591.

³ *Heyer v. Deaves*, 2 Johns. Ch. 154;

should exercise for their benefit, in order to obtain a fair price for the property; besides, as shown in the next section, he has a reasonable discretion as to the necessity of adjournments,—a duty which he cannot properly delegate to another.¹ He may employ an auctioneer to sell, but the sale must take place in his presence and under his direct control.² In a New York case where the sale was made by a competent agent in the absence of the master, the latter being sick, and where all other objections as to the fairness and regularity of the sale were removed, Chancellor Kent set the sale aside, remarking that “to allow such a sale to stand would open the door to a very lax and dangerous practice.”³ As to the time at which the sale must be made, it is sufficient to say that it must take place at the time and place named in the notice. A sale at any other time or place than that named in the notice is, in effect, made without any notice whatever. As to the time, therefore, the master must be careful to sell neither too soon nor too late. A notice stating that the sale will take place at a particular hour named therein means that the sale will be made sometime during the hour specified. Thus, in an Illinois case, the advertisement of the sale gave notice that the property would be sold “at the hour of eleven o’clock,” but the sale did not occur until half-past eleven o’clock, and it was claimed that, under the notice, the sale was bound to take place at eleven o’clock sharp; but the court did not concur in that view, holding that the law does not recognize fractions of an hour or fractions of a day, and that when a notice says that a sale will be made at the hour of eleven o’clock, the practical common sense of the language used is, that the sale will be made during the hour of eleven, or between eleven and twelve o’clock. This is upon the ground that eleven o’clock means from eleven until twelve. It would have been impossible to have made the sale precisely at eleven o’clock. That is but an instant, and before two lines of the notice could have been read the time would have been gone. The law does not expect or require impossible things, and a moment’s reflection

¹ 2 Jones on Mortgages, sec. 1633. Johns. Ch. 154; Snyder v. Stafford,

² Blossom v. Railroad Co., 8 Wall. 11 Paige, 71.

(U.S.) 196, 205; Williamson v. Berry, 8 ³ Heyer v. Deaves, 2 Johns. Ch.
How. (U. S.) 495; Heyer v. Deaves, 2 154.

is enough to convince any reasonable person that an officer, under such a notice, is not required to appear and sell precisely at eleven o'clock, but that the notice gives him the right to appear at any time during the hour and make the sale.¹

§ 578. **Master's authority to adjourn the sale.**— If, when the time of sale arrives, the master, by reason of any unforeseen event, discovers that he cannot proceed with the sale, or that, if he does proceed, the result will be a sacrifice of the property, it is within his power to adjourn the sale to another time, and it may be, unless the place of sale is fixed by the decree of the court or by statute, to another place. Not only is it within the sound discretion of the master to so adjourn a sale, but it not infrequently happens that it is the duty of the master so to do. It may be, in a particular case, that it is physically impossible to proceed with the sale. By reason of inclemency of the weather, by reason of pestilence,² or, it may be, by reason of the undesirable character of the property offered, there may be an absolute want of bidders, or, if any bidders present, there may be such an absence of competition as to render it evident that to proceed will inevitably result in a sacrifice of the property. Hence the master has the power, even after the auction has begun and bids have been made, to adjourn the sale.³ An application for an adjournment may, and usually does, come from some one or more of the interested parties, but it may be the duty of the master to adjourn the sale of his own motion, or even against the express wish of a party.⁴ This power of adjournment does not depend upon any statutory enactment, but, in the absence of any such provision, is implied as a matter of necessity.⁵ Without such authority cases may frequently arise where, owing to the absence of bidders, combinations among them, or a want of competition produced from any other cause, the property exposed for sale would be absolutely sacrificed. Hence "the authority of an officer to adjourn a sale, in the exercise of a sound and reasonable discretion, has been so long and universally recognized in

¹ *McGovern v. Union Mutual Life Ins. Co.*, 109 Ill. 151, 155.

² See *ante*, § 570, and *post*, § 609.

³ *Blossom v. Railroad Co.*, 3 Wall. 196.

⁴ 2 Jones on Mortgages, sec. 1634.

⁵ *Jewett v. Guyer*, 88 Vt. 209.

practice that it ought not now to be questioned.”¹ The power delegated to a trustee to sell at public auction, after due notice of the time and place of such sale shall have been given, includes the power regularly to adjourn the sale to a different time and place, when, in his discretion fairly exercised, it shall seem to him necessary to do so in order to obtain the fair auction price for the property. If he has not this power, the elements or many unexpected occurrences may prevent an attendance of bidders, and cause an inevitable sacrifice of the property. A sale regularly adjourned, so as to give notice to all persons present of the time and place to which it is adjourned, is, when made, in effect the sale of which previous public notice had been given.²

This was held by the supreme court of the United States, in a case where the sale was made by a trustee, under a power contained in a mortgage, and that court further say: “The courts of several states have gone further in this direction than we find necessary, though we do not intend to intimate any doubt of the correctness of their decisions. They have held that a public officer, upon whom a power of sale is conferred by law, may adjourn an advertised public sale to a different time and place, for the purpose of obtaining a better price for the property.”³ The power to adjourn a judicial sale to a different *place* depends on the fact whether the place of sale was fixed by the court or left to the discretion of the master. If the latter, then there is no question as to his power to change it by adjournment to a different place, but, if the place of sale is fixed by the order of the court, the officer has no power to change it by adjournment to a different place; in other words, the officer conducting a judicial sale has power to change the place of sale, “provided that it is changed to a place which the officer was authorized to appoint as the place for the sale in the first instance.”⁴

¹ Id. For an excellent note on the power of an officer to adjourn a public sale, see 26 Am. Dec. 536 *et seq.*

² Richards v. Holmes, 18 How. (U. S.) 143, 147.

³ Citing Tinkom v. Purdy, 5 Johns. 845; Russell v. Richards, 11 Me. 371,

26 Am. Dec. 532; Lantz v. Worthington, 4 Barr, 153; Warren v. Leland, 9 Mass. 265.

⁴ Jewett v. Guyer, 38 Vt. 209; Omaha L. & T. Co. v. Bertrand, 51 Neb. 508, 70 N. W. 1120.

§ 579. Master's authority to adjourn the sale — Continued. This duty of adjournment is one that cannot be delegated to another, but must be exercised by the master. An adjournment of a sale is one which often calls for the exercise of a reasonable discretion, and is as much an official act as that of selling itself. Like the act of making the sale the court relies upon the good judgment of the master to determine whether the necessity for an adjournment exists, and if the power in this regard is exercised in an arbitrary or unreasonable manner it constitutes good ground for setting the sale aside.¹ The discretion of the officer in adjourning a sale must be a legal discretion,—a discretion justified by the exigency of the situation, and not the exercise of an arbitrary preference.² Consequently, where the officer delegated this power to the attorney of one of the parties, the sale was set aside.³ As to the notice required in case of an adjournment, the authorities agree that it should be announced at the time of adjournment, when practicable so to do;⁴ but as to what additional notice is required the courts do not agree. In New Jersey it was held that no other notice is necessary than that given by proclamation at the time of the adjournment;⁵ but in Illinois, and in some other jurisdictions, directly the opposite is held. The supreme court of Illinois, in passing upon this question, say: "We recognize the right and duty of a trustee, as well as a sheriff or other officer or commissioner, to adjourn a sale whenever, from any cause, a reasonably advantageous price cannot be had, and when it is necessary to prevent a great sacrifice of the property; but we also hold that he must give the same notice as originally required."⁶ It must be confessed that the better reasoning is in favor of requiring a new notice to be given;⁷ and, as in no case can it be held error so to do, it is better in all cases to repeat the original notice.

¹ Breese v. Busby, 13 How. (N. Y.) Pr. 485. N. J. Eq. 811; Allen v. Cole, 9 N. J. Eq. 286.

² Gilbert v. Watts-De Golyer Co., 169 Ill. 129, 135.

³ Wolf v. Van Metre, 27 Iowa, 348.

⁴ La Farge v. Van Wagenen, 14 How. (N. Y.) Pr. 54.

⁵ Coriell v. Ham, 4 G. Greene, 455, 61 Am. Dec. 134; Coxe v. Halsted, 2

⁶ Thornton v. Boyden, 31 Ill. 200; Griffin v. Marine Co., 52 Ill. 130, 141; Botsford v. O'Conner, 57 Ill. 72; Jackson v. Spink, 59 Ill. 404. To the same effect, see Enloe v. Miles, 12 Smedes & M. (Miss.) 147, and Patten v. Stewart, 26 Ind. 395.

⁷ See note, 26 Am. Dec. 539.

§ 580. The sale proper.— When the hour for the sale arrives one of three things must be done:

First. The debtor may stop the sale of his property by payment of the debt and costs.

Where property is being sold under an order of court for the purpose of paying a debt, the debtor, or any one in his behalf, may stop the sale by payment.¹ This rule would not apply to a sale by a master where other parties besides the principal creditor have proven up their claims and the decree orders the money to be brought into court for distribution, unless the debtor or other party pays all the claims in full, including all costs.

Second. The sale should be adjourned by the master if the exigencies of the case demand it; or

Third. The master must proceed with the sale.

Assuming now that the sale has not been stopped by payment of the debt, or postponed by an adjournment, it is the duty of the master to proceed to sell in accordance with the order of the court. Having, in a previous section, shown who must sell, it remains for us to ascertain who may buy. The general rule is that any person capable of entering into a valid, binding contract for the purchase of property at private sale may become a purchaser at a judicial sale. To this general rule there are certain exceptions; that is, certain persons, because of their relation to the parties or to the matter in controversy, are, on the ground of public policy, denied the privilege of becoming purchasers. They may be enumerated as follows:

First. The officer making the sale.

No sheriff, master, marshal, constable or other officer whom the law requires to sell and divest the owner of property of his title can become a purchaser at his own sale, whether such sale is made by such officer in person or his deputy or crier. The law will not permit a man to act under such temptation to yield to fraud and oppression. In such cases the sales are under the entire control of the officer, and he has but to will it, and the property may be sacrificed, the owner wronged and oppressed, and, if the officer were the purchaser, the owner's interest would be sacrificed to the profit of the

¹ United States v. Vestal, 4 Hughes (U. S.), 467; s. c., 12 Fed. 60.

officer. These are the considerations which render all such sales voidable.¹ Human infirmity, says Chancellor Kent, will rarely permit a man to exert against himself that providence which a vendor ought to exert in order to sell the estate most advantageously for the *cestui que trusts*, and which a purchaser is at liberty to exert for himself in order to purchase at the lowest price.²

Second. The auctioneer and all other parties acting as agents or assistants of such officer in making the sale.

It is not proper for an auctioneer engaged in making a sale to bid on his own account. He cannot act both as buyer and seller. The two positions are inconsistent.³ The authorities are numerous holding such sales, voidable and unlawful as opposed to the soundest public policy.⁴

Third. Not only are the foregoing parties forbidden to purchase in their own names, but they are also forbidden to purchase in the name of another.

Where a party cannot buy directly he cannot do so indirectly.⁵

Fourth. Not only are such persons prohibited from buying on their own account, either directly or indirectly, but they are also prohibited from buying for another.

A person who cannot buy for himself cannot buy the estate as agent for another.⁶ Chancellor Kent says: "The distinction of its being a weaker temptation is too thin to form a safe rule of justice."⁷

Having enumerated those who are forbidden to buy at a judicial sale, let us see who may buy. They may be stated as follows:

First. Parties to the suit.

¹ Dempster v. West, 69 Ill. 613, 619; Michoud v. Girod, 4 How. 503, 553; Wormley v. Wormley, 8 Wheat. 421.

² Davoue v. Fanning, 2 Johns. Ch. 252, 265.

³ Veazie v. Williams, 8 How. (U. S.) 134, 151.

⁴ Michoud v. Girod, 4 How. (U. S.) 503, 554; Litchfield v. Cudworth, 15 Pick. (Mass.) 23, 30; Tufts v. Tufts, 8 Wood. & M. 456, 490 *et seq.*, Fed. Cas. 14,233; Torrey v. Bank of New Orleans, 9 Paige, 649, 663; Veazie v. Williams, 3 Story, 611, 624, Fed.

Cas. 16,907; Long on Sales, 228; 1 Story Eq. Juris., § 815.

⁵ Litchfield v. Cudworth, 15 Pick. (Mass.) 23, 30 and cases cited; Church v. Marine Ins. Co., 1 Mason C. C. 341, Fed. Cas. 2,711; Miles v. Wheeler, 43 Ill. 123; Kruse v. Steffans, 47 Ill. 112; McConnel v. Gibson, 12 Ill. 128.

⁶ Michoud v. Girod, 4 How. (U. S.) 503, 555; Coles v. Trecothick, 9 Ves. 234, 248; Ex parte Bennett, 10 Ves. 381.

⁷ Davoue v. Fanning, 2 Johns. Ch. 252, 265; Ex parte Bennett, 10 Ves. 385.

A sale made by a master in chancery, under the direction of a court of chancery, is not a sale made by either of the parties. A master is the representative of the court, as a marshal or sheriff in an action at law. He is not under the control of either party; he is not the agent of either to make the sale; hence at such public judicial sale, either party, as a rule, may bid.¹ A creditor may become a purchaser at a master's sale under a decree in his own favor. No one questions this, because the officer exercises the power, and the creditor becomes the purchaser only by enhancing the price of the property sold, without any power to depress it. He only becomes the purchaser by bidding more than any other person. He has no control over the officer exercising the power.² But if it can be shown, as a matter of fact, that the creditor or other purchaser exercised or had undue influence over the officer, then the reason of the rule ceases, and, if such purchaser thereby reaps an undue advantage, such sale is voidable.³

Second. The attorneys or solicitors of the parties.

There is no rule of law which prohibits an attorney of the complainants from becoming a purchaser at a master's sale of the property of his client, but in such cases the attorney must act in good faith. In such a case the conduct of the attorney will be closely scrutinized, and, if he has not acted with strict fairness, the purchase will be held to have been made for his client.⁴ In such a case, where fraud is charged, the same rule is applied as in all other cases where the defendant acted in a fiduciary relation; that is, the burden is on him to prove that his conduct in the matter charged was free from fraud; in other words, the burden rests upon him to prove himself "not guilty."⁵ In a case where the property was sold upon a stormy day, with no one present but the sheriff and the attorney who became the purchaser at a grossly inadequate price, Chancellor Kent held the purchaser to be a trustee for the parties, and that the debtor had the right of redemption.⁶

¹ *Pewabic Min. Co. v. Mason*, 145 U. S. 849, 361, 362, 12 Sup. Ct. R. 887; *Richard v. Holmes*, 18 How. (U. S.) 143; *Smith v. Black*, 115 U. S. 308, 6 Sup. Ct. R. 50; *Allen v. Gillette*, 127 U. S. 589, 8 Sup. Ct. R. 1331; *Smith v. Arnold*, 5 Mason, 414, Fed. Cas. 13,004.

² *Dempster v. West*, 69 Ill. 613, 619.

³ *Id.*

⁴ *Hess v. Voss*, 52 Ill. 472, 481.

⁵ *Ante*, § 343.

⁶ *Howell v. Baker*, 4 Johns. Ch. 118. See also *Byers v. Surget*, 19 How. (U. S.) 303.

Third. All other persons except those enumerated as prohibited as above.

It is perhaps needless to add that, after the sale has been perfected and the title of the property vested in the purchaser, the officer making the sale, or other parties forbidden to buy, may deal with the property precisely as any other person may do. The supreme court of Illinois, speaking of trustees selling under a power contained in a mortgage, say: "Jealous as courts of equity are, watching the conduct of a trustee in connection with the objects of his trust, he is only forbidden by them from dealing with the trust property for his own benefit, so long as the trust continues. The moment it ceases he occupies precisely the same relation to it that strangers to the trust do, and, acting in good faith, he may become the owner by purchase or otherwise."¹ Precisely the same principle applies to the master and other persons who, because of their relation to the parties to the suit or property, are prohibited from purchasing at a judicial sale. When the relation ceases the prohibition terminates.

§ 581. The sale proper — Continued.— A bid, in its most comprehensive sense, signifies to make an offer; in its more ordinary acceptation, to make an offer at an auction²—the offer itself. One who bids at an auction sale is not a purchaser, but simply one who offers to purchase at a given price. Even after the party making the offer is declared the highest bidder and the property knocked off to him, still he is not a purchaser, but is simply one who has contracted to purchase at a given price, provided his offer, upon being reported to the court, is accepted. "Until the sale has been confirmed the proceeding is *in fieri*; the bidder is not considered a purchaser, . . . nor is he compellable before confirmation to complete his purchase; but as soon as the sale is absolutely confirmed then the contract becomes complete—the bidder, by the acceptance of his bid, becomes a purchaser, and he may be compelled by the process of the court to comply with his contract."³ There is a wide difference between a bidder at a judicial sale and a purchaser. Until confirmed by the court

¹ Munn v. Burges, 70 Ill. 604; Bush v. Sherman, 80 Ill. 160, 172.

² State v. Yopp, 97 N. C. 447.

³ Virginia F. & M. Ins. Co. v. Cottrell, 85 Va. 857, 9 S. E. 132; Hildreth v. Turner, 89 Va. 858, 865, 17 S. E. 471.

it is not a sale only in a popular sense and not in judicial or legal sense.¹ A bid being an offer made to the auctioneer or crier of a public sale it may be made by any means that conveys the information to such party. Thus, it is said that "a bid may be made in words, uttered aloud in the hearing of the bystanders, or spoken privately to the auctioneer; or by writing in words or figures; or it may be made by a wink or nod, or in any mode by which the bidder signifies his willingness and intention to give a particular price for the property offered for sale."²

A party not present may bid on the property; thus a party not present may bid by letter, but his bid must be publicly cried at the time and place of sale.³ The reason requiring such a bid to be publicly announced and cried is that, unless this is done, it cannot be known that some bystander would be willing to give more,—the same reason that forbids the auctioneer from secretly entertaining a bid made in any other manner. All must be publicly announced and, in justice to the parties in interest, an effort made to secure an advance upon the last bid made. A party may bid in person or have an agent bid for him, and it is no valid objection to a sale that the purchaser employed another person to bid for him. "It is within common observation and knowledge that bidders at a sale are frequently the representatives of other persons, and no reason is perceived why an administrator, master in chancery or sheriff, making a sale, should not issue the certificate of purchase or execute the deed, as the case may be, to any one indicated by the bidder as the purchaser at the sale."⁴ Yet such agent should in all cases, to avoid personal liability, announce the name of the party for whom he is bidding, because one who bids for another, yet fails to disclose the name of his principal on the day of sale, will be held responsible as the purchaser.⁵ As a bid is only an offer to buy the property at the

¹Rorer, *Jud. Sales*, sec. 124; *Hildreth v. Turner*, 89 Va. 858, 864, 17 S. E. 471.

²*Millingar v. Daly*, 56 Pa. St. 245, 246.

³*Dickerman v. Burgess*, 20 Ill. 266. See also *Thomson v. Ritchie*, 80 Md. 247, 30 Atl. 708; *Tyree v. Williams*, 3 Bibb, 365, 6 Am. Dec. 663.

⁴*Gibbs v. Davies*, 168 Ill. 205, 210, 48 N. E. 120; *Ingalls v. Rowell*, 149 Ill. 163, 36 N. E. 1016; *Quigley v. Breckenridge*, 180 Ill. 627, 636, 54 N. E. 580.

⁵*McComb v. Wright*, 4 Johns. Ch. 659.

price named, it follows that such offer may be withdrawn at any time before it is accepted; that is, the bidder may revoke his bid at any time before the hammer falls.¹ Yet in no case can the next highest bidder be held where the highest bid is revoked or rejected.²

It must not be understood, however, that the rule requiring the sale of the property to be to the highest bidder compels the officer to entertain every bid offered without any reference to the responsibility of the bidder. On the contrary the officer is invested with a reasonable discretion in this regard, and may refuse a bid, in case the facts warrant it and justice seems to require it.³ The exercise of such discretion on the part of the officer must be a legal one, and so controlled as to work no injustice or oppression.⁴ The previous conduct of a bidder may be such as to justify the master in rejecting his bid. Thus, at a second sale, the bid of a party was rejected by the officer on the ground that she defeated the first by bidding the property off and then failed to comply with her contract.⁵

After the property is knocked off to the highest bidder, it sometimes happens that he becomes desirous of assigning or transferring his right to another, that is of being discharged from his contract and of substituting another person in his stead. This is usually done on motion, the court, however, requiring such motion to be supported by an affidavit that there is no under-bargain, for the new purchaser may give the other a sum of money to stand in his place, and so deceive the court.⁶ The rule appears to be, that if a purchaser resells behind the back of the court, before his purchase is confirmed, the second purchaser is considered a substituted purchaser, and must pay

¹ Blossom v. Railroad Co., 3 Wall. 196; Mayhew v. West Virginia Oil & Oil Land Co., 24 Fed. 205, 215; National Bank v. Sprague, 20 N. J. Eq. 159; Barnes v. Zoercher, 127 Ind. 105, 26 N. E. 769; Nebraska L. & T. Co. v. Hamer, 40 Neb. 281, 58 N. W. 695.

² Gray v. Case, 51 Mo. 463; Swortzell v. Martin, 16 Iowa, 519; Nebraska L. & T. Co. v. Hamer, 40 Neb. 281, 58 N. W. 695; Mathews v. Clifton, 18 Smedes & M. 330; Dills v. Jasper, 33 Ill. 263.

³ Merwin v. Smith, 2 N. J. Eq. 182; Den v. Zellers, 7 N. J. L. 158; Thomson v. Ritchie, 80 Md. 246, 80 Atl. 708; Hildreth v. Turner, 89 Va. 858, 17 S. E. 471.

⁴ Merwin v. Smith, 2 N. J. Eq. 182, 197.

⁵ Hildreth v. Turner, 89 Va. 858, 868, 17 S. E. 471.

⁶ Rigby v. Macnamara, 6 Ves. 515; Vale v. Davenport, 6 Ves. 615; 2 Daniell, Ch. Pr. (1st ed.) 922.

the additional price into court for the benefit of the estate.¹ Where all parties consent to the substitution, the usual affidavit required to satisfy the court that there is no under-bargain may be dispensed with.²

§ 582. **The sale proper — Continued.**— The duty of the master making a sale is to sell the property to the best advantage, so it will bring the most money, and to sell no more property than is necessary to satisfy the debt and costs. He should, therefore, where the property is susceptible of division, sell it, or at least offer it for sale in separate parcels. But this rule does not require a master to subdivide a quarter-section into eighties or forties, and offer such smaller tracts first, for sale, where the mortgage being foreclosed is on the larger tract.³ What is meant is this: where the mortgage and decree describe the land as a single tract, it is not the duty of the master to divide the land into parcels in making the sale; but where several distinct tracts are ordered sold, then it is the duty of the master to sell each parcel separately.⁴ Where several tracts are to be sold it is the duty of the officer making the sale to offer each tract separately, and, if one tract will not sell separately, add another to it, and add a third tract if no bid can be had for two tracts, and so on, and in that manner he may, upon a reasonable bid, sell the whole *en masse*. But a sale *en masse* should not be made merely because bids cannot be had for separate tracts when offered separately.⁵ After the property is knocked off to the highest bidder it is his duty to at once complete his part of the contract by paying the purchase price to the master, and this he may do without any apprehension of being held responsible for the proper distribution of the fund. A purchaser at a master's sale is not bound to see that the proceeds are distributed or paid out in accord-

¹ Hodder v. Ruffin, 1 Tamlyn, 341;
² Daniell, Ch. Pr. (1st ed.) 922. As to the caution exercised by the court upon a motion to allow one purchaser to be substituted for another, see Blackbeard v. Lindigren, 1 Cox, 205.

² Matthews v. Stubbs, 2 Brown, 391.

³ Dates v. Winstanley, 53 Ill. App. 623, 628; Davis v. Dresback, 81 Ill. 393; Patton v. Smith, 113 Ill. 499.

⁴ Patton v. Smith, 113 Ill. 499, 509.

⁵ Henderson v. Harness, 184 Ill. 520, 529, 56 N. E. 786; Phelps v. Conover, 25 Ill. 309; Morris v. Robey, 73 Ill. 462; Douthett v. Kettle, 104 Ill. 356. For remedy of party aggrieved by failure of master to offer to sell the property in separate parcels, where it consists of different tracts, see *post*, § 600.

ance with the order of the court,¹ and when he pays the price of the land he is in no way responsible for the fraud of the master and cannot be made to suffer thereby.² An officer conducting an official sale may misappropriate the proceeds of the sale and be faithless to his trust, yet an innocent purchaser cannot be prejudiced thereby.³ If the purchaser pays the price and fails to get title by reason of fault of master, the latter is liable to him in the amount,⁴ and, having by his purchase made himself a party to the suit, he may invoke the aid of the court to compel the return of the money, together with interest, attorney fee for examination of title, and other legitimate charges.⁵

§ 583. **Master's sales by private contract.**—Thus far we have only spoken of sales made by the master at public auction, for the reason that this is the course generally adopted by courts of chancery in the conversion of property, real or personal, into cash; but the court always has the power, and will, in a case where it is for the interest of the parties, depart from this usual course and direct the master to dispose of the property by private contract; but, to justify such departure from the usual method, the master must be specially directed so to do by the decree, or order of the court, because if the decree is in the ordinary form, the master and parties will not be permitted to depart from its directions, without authority previously obtained from the court. If the master, in such a case, proceeds to sell at private sale, without a previous modification of the order, the court will decline to confirm the sale and will direct the master to proceed as directed in its order.⁶ In case the parties interested discover, after an order is made to sell at public sale, that it is for their best interest for the master to sell at private sale, application should be made to the court for a modification of its order, and, if an individual is desirous of purchasing by private contract, the proper course is for him to make a proposal to the vendor, or

¹ *Mulford v. Stalzenback*, 46 Ill. 808, 809.

² *Oglesby v. Foley*, 158 Ill. 19, 38 N. E. 557.

³ *Mulford v. Stalzenback*, 46 Ill. 808, 809.

⁴ *Sexton v. Nevers*, 20 Pick. 451.

⁵ See *post*, § 616.

⁶ *Annesley v. Ashurst*, 3 P. Wms. 282; 2 *Daniell, Ch. Pr.* (1st ed.)

931.

to the plaintiff in the cause, and to procure him, or some other party to the cause, to make an application to the court for an order to refer it to the master to inquire, and state to the court whether it will be for the benefit of the parties interested in the estate that his proposal should be accepted. Daniell says that, sometimes, in cases of this nature, a contract is actually entered into by the parties, subject to the approbation of the master, before any application is made to the court, the advantage of which course appears to be, that a definite arrangement is entered into, subject to the master's approval, before any expense is incurred, either before the court or before the master.¹

IV. REPORT OF SALE AND ITS CONFIRMATION.

§ 584. Master's report of sale.—In all cases of judicial sales, unlike sales made by a sheriff under an execution, the successful bidder acquires no title by the sale alone, but only the right to have his claim presented to the court to be passed upon; that is, as we have already seen, he is not a *purchaser*, but has been simply declared by the agent of the court to have been the *highest bidder*, and, as such, is entitled to have the court advised of that fact in order that it may take such further action as may be necessary to confirm his title. As all chancery sales are made subject to the approval of the court, it follows, as a matter of necessity, that some means must be adopted to inform the court as to what has been done by the officer under its order; in other words, the court must be advised in what manner its order of sale has been executed. To use the language of the court in a Kentucky case, "the accepted bidder at such a sale acquires by the mere acceptance of his bid no independent right, as in the case of a purchaser under an execution, to have his purchase completed, but is nothing more than a preferred bidder or proposer for the purchase, depending upon the sound, equitable discretion of the chancellor for the confirmation of a sale made by a ministerial agent."² Hence, as above stated, the necessity of the court

¹ *Loc. cit.* 981. For full details of practice in such cases, see 2 Smith, Ch. Pr. (ed. 1884), 198 *et seq.*

² *Busey v. Hardin*, 2 B. Mon. 407, 411.

being advised as to the manner in which its "ministerial officer" has discharged the duty devolved upon him. The court therefore requires that the master, commissioner, or other officer executing its order, shall make a report "disclosing generally what notice was given of the intended sale, what property was sold, the name of the purchaser, and such other facts as may assist the court in determining whether the sale was fairly and lawfully made and ought to be approved."¹ A decree in chancery authorizing a master, commissioner, or other officer, to make a sale of real estate, receive the purchase-money, and make title, without requiring a report and confirmation of the sale, is irregular and erroneous.² As to the requirements of the report of sale, it may be briefly said that the report must be full enough to show to the court in what manner the master has executed all the material duties devolved upon him by the order of sale. The master, being purely a ministerial officer, as to all matters provided for in the decree, has no discretion, his duty being simply to obey. As already shown, the decree constitutes the master's sole authority to make the sale, and unless he follows the authority there given the sale cannot be approved, if objection is made in apt time.³

It follows that, to determine what are the essential requirements of a master's report of sale in a given case, we must know the provisions of the decree of sale. In an ordinary foreclosure sale the master's report should show as follows:

1. The report should state fully the facts in regard to notice of sale given by the master. What the court wants are the facts, so that the court can determine whether the master has complied with the terms of the decree, or the statute, if there is a statutory provision covering the subject.

2. The report must state the facts in regard to the notice be stated in the report, but such statement should be accompanied by a list of such facts. The burden is on the master to show that he has complied with the decree. If he posted notices, his report must show that fact and where they were posted. If

¹ *Man, Void Judicial Sales*, 14 N. E. 288; *Freeman on Executions*, 14 N. E. 288.

² See also *Dula v. Seagle*, 98 N. E. 517.
³ 1 S. E. 549.

⁴ *Quick v. Collins*, 197 Ill. 391, 394, 64 N. E. 288; *Jacobus v. Smith*, 14 Ill. 359; *Sowards v. Pritchett*, 37 Ill.

such notices were posted by others, the report should show such fact, and should also be accompanied by affidavits proving the posting.¹ As to the fact that the proper notice of the sale was given, some proof, other than the bare assertion of the master, is required. The report should be accompanied by a copy of the notice with an affidavit that it was duly posted as required by the decree, or, if printed in a newspaper, the usual certificate of the printer should be attached.² But, in another Illinois case, it is said that it is not necessary for the master to set out the notice in his report of sale, but on application for its confirmation all that is necessary is that the court shall be satisfied that the sale was made in accordance with the requirements of the decree. It is not necessary that evidence of that fact be preserved in the record, unless the confirmation of the report is resisted and it is desired by one of the parties, the presumption being that the court had sufficient evidence to warrant the confirmation.³

Second. The report should show that the master attended at the time and place named in the notice, and, if the sale was adjourned for want of bidders, or for any other reason, the report should state such fact; and further, it should show what additional notice was given; but, if no adjournment was had and the property was sold, then the report must show the facts, as follows:

(a) That the property was offered for sale at public auction, to the highest bidder, for cash, or in accordance with the terms of the decree, as the case may be.

(b) The report should show how the property was offered, whether in separate parcels, or *en masse*.

(c) The report must show the name of the highest and best bidder, to whom the property was struck off, and the amount of his bid.

Third. The report must show the total amount realized from the sale.

Fourth. When the proceeds of the sale are ordered to be disbursed by the master, then it should show to whom payments were made, the amount of each payment, the amount retained by the master as fees, and vouchers for each item

¹ Quick v. Collins, 197 Ill. 391, 64 N. E. 288.

² Tibbs v. Allen, 29 Ill. 535, 549.

³ Moore v. Titman, 33 Ill. 358, 366.

should be attached to the report, which vouchers should be duly marked as exhibits "A," "B," etc.

Fifth. Where the law or the decree provides for a certificate of sale to be issued to the purchaser, and one has been executed and delivered to the purchaser, such fact should be stated.

Sixth. If the amount realized was insufficient to pay the debt, costs and expenses, such fact should be stated, and, on the contrary, if there is a surplus remaining in the master's hands to be paid out under the order of the court, such fact should be shown.

§ 585. *Master's report of sale — Continued.*— As shown in the last section the form of a master's report of sale depends to a large extent upon the duties required of the master by the court. The form of such report must, therefore, be varied in accordance with what has been done in the execution of the decree of sale. The following form of master's report of sale in a foreclosure proceeding is given, where the master is directed to sell for cash, disburse the proceeds, and make report of his acts and doings to the court:

Master's Report of Sale and Distribution.

STATE OF ILLINOIS, } County of Cook. }	ss. Circuit Court of Cook County. In Chancery.
James M. Parker	} Gen. No. 204,624. Term No. 7,296. Foreclosure
v.	
George W. Rogers,	
Maria J. Rogers and Henry S. Robinson, Trustee.	

To the Honorable Judges of said Court, in Chancery sitting:

In pursuance of a decree entered in the above entitled cause on the sixteenth day of October, A. D. 1902, I, Wm. Fenimore Cooper, a master in chancery of said court, respectfully report that more than thirty days having elapsed after the entry of said decree, and said defendants not having paid the whole or any part of the money by said decree required to be by them paid, I duly advertised, according to law and to said decree, the premises in said decree and hereinafter described, to be sold at public auction to the highest and best bidder therefor, for cash, at the hour of 11 o'clock, in the forenoon, on Tuesday, the sixth day of January, A. D. 1903, at the judicial sales rooms of the Chicago Real Estate Board, No. 57 Dearborn

street, in the city of Chicago, in said county of Cook, by causing a notice containing the title of said cause, the names of the parties thereto, the name of the court wherein such cause was pending, and a description of the premises to be sold, and a statement of the aforesaid time, place and terms of said sale, to be published for three successive weeks immediately prior to said day of sale, to wit, three times in the Chicago Daily Law Bulletin, a public secular daily newspaper of general circulation, printed and published every day in the city of Chicago, county of Cook, and state of Illinois. That the date of the first paper containing said notice was the eighteenth day of November, A. D. 1902, and the date of the last paper containing said notice was the twentieth day of December, A. D. 1902, a certificate of which publication is hereto attached, marked "Exhibit A."

That at the time and place so designated for said sale, I attended to make the same, and offered and exposed said premises for sale at public auction to the highest and best bidder therefor, for cash.

Whereupon James M. Parker offered and bid therefor the sum of thirty-nine hundred and twenty-four dollars and forty cents (\$3,924.40), and that being the highest and best bid offered therefor, I accordingly struck off and sold to said bidder for said sum of money the said premises, which are situated in the city of Chicago, county of Cook, and state of Illinois, and described as follows to wit: Lots nine (9) and ten (10), in Ward and Moreland's Addition to Chicago, being a subdivision of the east half (E. $\frac{1}{2}$) of the northeast quarter (N. E. $\frac{1}{4}$) of section fifteen (15), township thirty-nine (39) north, range thirteen (13) east, of the third principal meridian.

And I further report that I first offered said premises in separate parcels, and that I received no bid therefor, or for any lot or part thereof when so offered, whereupon I offered the same *en masse* and received therefor the said bid of thirty-nine hundred and twenty-four dollars and forty cents (\$3,924.40), which I accepted.

The amount realized from the sale of said premises was, in the aggregate, the sum of thirty-nine hundred and twenty-four dollars and forty cents (\$3,924.40).

Of said aggregate sum I have credited, disbursed and retained as follows:

Allowed complainant on account of	amount due on decree....	\$3,700 00
" " " " "	taxed costs	122 50
Retained	master's report.....	20 00
" " " " "	advertising sale.....	10 40
" " " " "	notice and report of sale..	3 75
" " " " "	certificate and recording..	1 75
" " " " "	approving decree.....	1 00
" " " " "	commissions on sale.....	66 00

The vouchers for said payments are hereto attached, marked Exhibits "A" and "B." I have executed and delivered to James M. Parker, purchaser at said sale, the certificate of sale directed by said decree, and by law, to be executed, and have filed in the office of the recorder of deeds of said Cook county a duplicate of said certificate.

In conclusion, I report that the proceeds of said sale were insufficient to pay the amount found to be due to said complainant, James M. Parker, for principal and interest and the costs and expenses of sale.

All of which is respectfully submitted.

Dated this ninth day of January, A. D. 1903.

WM. FENIMORE COOPER,

Master in Chancery of the Circuit Court of Cook County, Illinois.

\$3,322.50.

CHICAGO, ILL., January 9, 1903.

Received of Wm. Fenimore Cooper, master in chancery of the circuit court of Cook county, in the state of Illinois, the sum of thirty-eight hundred and twenty-two dollars and fifty cents (\$3,822.50), for debt, interest and solicitor's fees, under the decree in the within entitled cause, and the further sum of one hundred dollars (\$100) on account of complainant's taxed costs therein.

Exhibit "A."

JOHN G. THOMPSON,
Solicitor for Complainant.

The distribution of the fund is a matter to be determined by the court. The court may, and in some cases will, order the property to be sold and direct the officer making the sale to bring the fund into court to be distributed under an order subsequently to be entered. Such a course may be necessary from the fact that the property may be of a perishable nature, or it may be that it requires considerable expense on the part of the officer to care for it, or there may be other reasons which render it to the best interest of the parties that the property should be sold at once, before the court has had time to determine the rights of the contending parties, and the fund brought into court to await the result of the litigation. But, in ordinary foreclosures of mortgages upon real estate, and in all other cases where it is practicable so to do, the court should, prior to the sale, settle all disputed questions relative to the distribution of the proceeds. This course advises the master as to the distribution, and enables parties to bid with knowl-

edge of their interest in the proceeds.¹ In the distribution of the fund the master has no discretion whatever, but must obey the order of the court. He must never forget the fact that he is but the ministerial officer of the court, and that, as such, his duty is to simply execute the order of the court. Hence, he cannot go behind the decree, but must distribute to the parties according to their respective interests as fixed by the court.²

§ 586. Confirmation of master's report of sale.— The next step in the proceedings is the confirmation of the master's report of sale. The matter is brought before the court on motion to confirm, and the order is entered as of course, if there is no opposition; but notice of such motion must be given to all parties who were entitled to notice of proceedings in the master's office.³ As a general rule, the courts hold that the sale is incomplete until the order of confirmation is entered by the court.⁴ And it is held that a purchaser at such a sale acquires no rights in the property prior to such confirmation, nor will the deed of the purchaser from the master confer upon him any rights, except to insist upon confirmation of the report and completion of his title.⁵ In Illinois, however, there is a line of decisions to the effect that confirmation of a master's report of sale is not necessary to divest title.⁶ In another Illinois case it is held that the confirmation and report of a sale is necessary where the purchaser refuses to complete his purchase in order to charge him with any deficiency arising

¹ *Snyder v. Stafford*, 11 Paige, 71.

² *Rice v. Southern R. R. Co.*, 9 Phila. 294. As to the duty of the master to obey the order of the court, see *ante*, §§ 160–163.

³ As to what parties are entitled to such notice, see *ante*, §§ 184–187.

⁴ *Wells v. Rice*, 34 Ark. 346; *Mills v. Ralston*, 10 Kan. 206; *Demaray v. Little*, 17 Mich. 386; *Hochgraef v. Hendrie*, 66 Mich. 556, 34 N. W. 15; *Henderson v. Herrod*, 23 Miss. 434; *Dula v. Seagle*, 98 N. C. 458, 4 S. E. 549; *Curtis v. Norton*, 1 Ohio, 137; *Childress v. Hurt*, 2 Swan (Tenn.), 487; *Todd v. Gallego Mills Mfg. Co.*, 84 Va. 586; *Allen v. Elderkin*, 62

Wis. 627, 22 N. W. 842; *Williamson v. Berry*, 8 How. (U. S.) 495; *Blossom v. Railroad Co.*, 3 Wall. (U. S.) 196; *Smith v. Arnold*, 5 Mason (U. S.), 414, Fed. Cas. 13,004.

⁵ *Eakin v. Herbert*, 4 Coldw. (Tenn.) 116; *Howard v. Bond*, 42 Mich. 131, 3 N. W. 289; *Martin v. Kelly*, 59 Miss. 652; *Woehler v. Endter*, 46 Wis. 301, 1 N. W. 329; *Allen v. Elderkin*, 62 Wis. 627, 22 N. W. 842.

⁶ *Jackson v. Warren*, 32 Ill. 331; *Dills v. Jasper*, 33 Ill. 262; *Moore v. Titman*, 33 Ill. 358; *Walker v. Schum*, 42 Ill. 462; *Comstock v. Purple*, 49 Ill. 158.

upon resale.¹ A later Illinois case seems to hold that the confirmation of sale is necessary to divest title of the purchaser; but in this case the purchaser had not received his deed, and the question was whether or not the certificate of purchase vested in the purchaser a sufficient interest to enable him to take a release of the dower interest of the widow, so that really the case is not in conflict with the prior Illinois decisions.²

But while in most jurisdictions the rule is that the report of a sale must be confirmed in order to divest title, yet lapse of time, if long enough, may operate as a ratification and obviate the necessity of confirmation.³ In case the master's report of sale is not confirmed at the proper time the court may enter an order confirming the sale subsequently.⁴ Especially is this true if a master's deed has been executed and delivered, accompanied by possession of the premises.⁵ But while it is discretionary with the court to confirm the sale or not, yet the court has no authority to change the terms of sale and then confirm it. This is beyond the power of the court and would be invalid.⁶ The subsequent confirmation of the master's report of sale relates back to the time of sale and carries title as from that date.⁷

§ 587. Confirmation of master's report of sale—Continued—Form of order.—The following form of order confirming the master's report of sale and distribution may be used in case there is no opposition to such confirmation. This

¹ Hill v. Hill, 58 Ill. 239.

² Hart v. Burch, 130 Ill. 426, 22 N. E. 831, 6 L. R. A. 371.

³ Learned v. Mathews, 40 Miss. 210; Moffitt v. Moffitt, 69 Ill. 641; Mulvey v. Carpenter, 78 Ill. 580; Mulford v. Beveridge, 78 Ill. 455; Cummings v. Burleson, 78 Ill. 281, 284; Mathews v. Eddy, 4 Oregon, 225; Mills v. Ralston, 10 Kan. 206; McVey v. McVey, 51 Mo. 406; Castleman v. Relfe, 50 Mo. 583.

⁴ McVey v. McVey, 51 Mo. 406; Wolff v. Wohlien, 32 Mo. 124; Strong v. Catton, 1 Wis. 471; Lupton v.

Almy, 4 Wis. 242; Downer v. Cross, 2 Wis. 371.

⁵ Gowan v. Jones, 18 Miss. 164; Harteaux v. Eastman, 6 Wis. 410; Redus v. Hayden, 43 Miss. 614; Mitchell v. Harris, 43 Miss. 314; Conger v. Robinson, 4 S. & M. (12 Miss.) 210.

⁶ Ohio L. Ins. & T. Co. v. Goodin, 10 Ohio St. 557; Benz v. Hines, 3 Kan. 390, 89 Am. Dec. 594.

⁷ Evans v. Spurgin, 6 Gratt. 107, 52 Am. Dec. 105; Wagner v. Cohen, 6 Gill, 97, 46 Am. Dec. 660. See Rorer on Judicial Sales, sec. 109, and notes.

order must be varied to suit the facts and circumstances of the particular case:¹

Order Confirming Master's Report of Sale.

STATE OF ILLINOIS,	{	ss.	In the Circuit Court of Cook County. To the January Term thereof, A. D. 1903.
County of Cook.			

James M. Parker	{	
v.		
George W. Rogers,		
Maria J. Rogers and Henry S. Robinson, Trustee.		
		Gen. No. 204,624. Term No. 4,866. In Chancery.

And now the above matter coming on again to be heard on motion of John Jones, solicitor for complainant, to confirm the master's report of sale and distribution, made by William Fenimore Cooper, one of the masters in chancery of this court, and heretofore filed herein, and it appearing to the court that Albert T. Brown, solicitor for the above named defendants, has been duly served with notice of this motion, and the court having examined said report and being fully advised in the premises, and it appearing to the court that the said master in chancery has proceeded in all things according to law and in conformity with the decree of this court: It is therefore

Ordered, adjudged, and decreed, that the said report of sale and distribution, and the said sale, be and the same are hereby in all things fully approved and confirmed.

§ 588. Master's certificate of sale.— Where real estate is sold with right of redemption, the officer's deed is necessarily deferred until the time of redemption expires. Some means, therefore, is necessary to advise subsequent purchasers, and others who are or may become interested in the property, of the amount of the lien, what the rights of the holder thereof are, and when the right of redemption expires. This matter is usually provided for by statute, and therefore differs in different jurisdictions. In Illinois it is provided by statute that it shall be the duty of the master in chancery, instead of executing a deed for the premises sold, to give to the purchaser a certificate describing the premises, showing the amount paid therefor, and the time when the purchaser will be entitled to

¹ For a longer form see Smith's Mortgage Foreclosures, p. 885, and for a New Jersey form, see Dickinson's Ch. Pr., p. 693.

a deed; and the statute further provides that the master shall, within ten days from such sale, file in the office of the recorder of the county in which the property is situated a duplicate of such certificate, which shall be recorded by such recorder.¹

The certificate so provided for may be in form as follows:

Master's Certificate of Sale.

STATE OF ILLINOIS, } ss. Circuit Court of Cook County.
Cook County. } In Chancery.

James M. Parker	}	Gen. No. 204,624. Term No. 4,866.
v.		
George W. Rogers,		
Maria J. Rogers and		
Henry S. Robinson,		
Trustee.		

I, Wm. Fenimore Cooper, master in chancery of the circuit court of Cook county, Illinois, do hereby certify that in pursuance of a decree entered on the sixteenth day of October, A. D. 1902, by the said court, in the above entitled cause, I duly advertised according to law the premises hereinafter described, to be sold at public vendue, to the highest and best bidder for cash, at the hour of eleven o'clock in the forenoon, on the sixth day of January, A. D. 1903, at the judicial salesrooms of the Chicago Real Estate Board, No. 57 Dearborn street, in the city of Chicago, in said Cook county, Illinois. That at the time and place so as aforesaid appointed for said sale, I attended to make the same, and offered and exposed said premises for sale at public vendue to the highest and best bidder for cash, whereupon James M. Parker offered and bid therefor the sum of thirty-nine hundred and twenty-four dollars and forty cents (\$3,924.40), and that being the highest and best bid offered therefor, I accordingly struck off and sold to said bidder for said sum of money the said premises, which are situated in the county of Cook and state of Illinois, and are described as follows, to wit: Lots nine (9) and ten (10), in Ward and Moreland's Addition to Chicago, being a subdivision of the east half (E. $\frac{1}{2}$) of the northeast quarter (N. E. $\frac{1}{4}$) of section fifteen (15), township thirty-nine (39) north, range thirteen (13) east, of the third principal meridian.

I further certify that unless said premises shall be redeemed from said sale within fifteen months from the date hereof, according to law, the said purchaser, James M. Parker, his legal representatives or assigns, will, on the sixth day of April, A. D.

¹ Hurd's Rev. Stat. 1901, ch. 77, secs. 16, 17.

1904, be entitled to a deed of the property so purchased by said James M. Parker.

Witness my hand and seal, this sixth day of January, A. D. 1903.

WM. FENIMORE COOPER, [SEAL.]
Master in Chancery of the Circuit Court of Cook County,
Illinois.

The execution and delivery of the foregoing certificate of sale, and the filing of a duplicate copy thereof in the office of the recorder, terminates the duties of the master in connection with the sale of the property, with the exception of the execution of either a certificate of redemption, in case the property is redeemed, or a master's deed in case the property is not redeemed.

V. ATTACKING A MASTER'S SALE.

§ 589. *Collateral and direct attack.*—Before proceeding to examine the different methods of attacking judicial sales, and the various grounds upon which such attacks may be made, it may be well to consider the distinction between direct and collateral attacks. A direct attack is a proceeding instituted primarily for the purpose of defeating the object of the sale, viz. the transfer of the title. Such a proceeding may be in the suit in which the order of sale was made, and may be by motion to set aside the sale, or by simply resisting the confirmation of the master's report of sale when application is made to the court for such confirmation; or such direct attack may be by an independent suit brought for the specific purpose of vacating the sale. A collateral attack may be made by asserting the invalidity of the sale in any other court or proceeding in which its validity is asserted.

To authorize a master to make a sale there must be a valid decree. To sustain or authorize a valid decree of sale two things must concur:

First. Jurisdiction of the subject-matter involved in the litigation; and

Second. Jurisdiction of the person of the parties to be affected by the decree.

Whether the court has jurisdiction of the subject-matter or not is purely a question of law, and the answer must be sought

for in the general nature of its powers, or in authority specially conferred by statute. Jurisdiction of the subject-matter has been defined to be "the power to hear a particular class of cases, or to determine controversies of a specified character."¹ "It is, in truth, the power to do both or either — to hear without determining, or to determine without hearing."² If this power does not exist there is a total lack of "jurisdiction of the subject-matter," a decree by the court is utterly void, binds no one, either party or stranger, and a sale under such a decree is incurably void.³ It is therefore absolutely essential to have a valid, binding sale that it must be based upon a valid, binding decree or order, and unless such is the fact the sale is a nullity.⁴ Unless the court has jurisdiction of both the subject-matter and the parties the decree is a nullity. This is axiomatic.⁵

The court having jurisdiction of the subject-matter and of the person, "no mere error or irregularity will affect the validity of the sale on collateral inquiry. The remedy is by appeal, if allowed by law, and if not, the proceedings are final and valid, notwithstanding such errors or irregularities."⁶ There

¹ Freeman, *Void Judicial Sales*, § 8.

² *Ex parte Bennett*, 44 Cal. 84, 88; *MacLachlan v. McLaughlin*, 126 Ill. 427, 429, 19 N. E. 544; *Kelly v. People*, 115 Ill. 583, 586, 4 N. E. 644, 56 Am. St. 184; *People v. Seelye*, 146 Ill. 189, 32 N. E. 458; *Johnson v. Miller*, 55 Ill. App. 168; *Maple v. Havenhill*, 37 Ill. App. 813; *Bush v. Hanson*, 70 Ill. 480; *Schroeder v. M. & M. Ins. Co.*, 104 Ill. 71.

³ Freeman, *Void Judicial Sales*, § 3; also Freeman on *Judgments*, §§ 119, 120; *Gray v. Hawes*, 8 Cal. 562; *Gunz v. Heffner*, 38 Minn. 215, 22 N. E. 386; *Shaefer v. Gates*, 2 B. Mon. 453, 88 Am. Dec. 164; *Cravens v. Moore*, 61 Mo. 178; *Barber v. Morris*, 37 Minn. 194, 33 N. W. 559, 5 Am. St. 836.

⁴ *Johnson v. Johnson*, 40 Ala. 247; *Botsford v. O'Connor*, 57 Ill. 72; *Miller v. Handy*, 40 Ill. 448; *Ferrier v. Deutchman*, 111 Ind. 830, 12 N. E.

497; *Harshey v. Blackmarr*, 20 Iowa, 161, 89 Am. Dec. 520; *Dorsey v. Kendall*, 8 Bush (Ky.), 294; *Albee v. Ward*, 8 Mass. 79; *Millar v. Babcock*, 29 Mich. 526; *Hamilton v. Lockart*, 41 Miss. 460; *Latimer v. Union Pacific R. Co.*, 43 Mo. 105, 97 Am. Dec. 378; *Abbott v. Sheppard*, 44 Mo. 273; *Wood v. Stanberry*, 21 Ohio St. 142; *Miller v. Miller*, 10 Tex. 319, 320; *Hollingsworth v. Bagley*, 35 Tex. 345; *Smith v. Cockrill*, 6 Wall. (U. S.) 756; *Morton v. Smith*, 2 Dill. (U. S.) 316, Fed. Cas. 9,867; *Webster v. Reid*, 11 How. (U. S.) 487.

⁵ *Buckmaster v. Carlin*, 8 Scam. (Ill.) 104; *Swiggart v. Harber*, 4 Scam. (Ill.) 364, 39 Am. Dec. 418; *Rockwell v. Jones*, 21 Ill. 279; *Wimberly v. Hurst*, 33 Ill. 166, 83 Am. Dec. 295; *White v. Jones*, 38 Ill. 159; *Mulford v. Stalzenback*, 46 Ill. 303, 306.

⁶ *Rorer*, *Jud. Sales*, § 64; *Goudy v. Hall*, 30 Ill. 109; *Grignon's Lessee v.*

being jurisdiction, the record imports absolute verity in all collateral attacks or proceedings.¹ In a collateral proceeding the findings of the court as to all jurisdictional facts are conclusive, unless the record shows to the contrary. The presumption is in favor of the finding, and can be overcome only where the record affirmatively shows the finding not to be in accordance with the facts.² To obtain a valid, binding decree against a party it is necessary to proceed against him in his proper name. In the absence of any statute permitting it, persons, natural or artificial, cannot be made parties litigant by mere *descriptio persona*, but must be designated by name, both in the process and in the judgment or decree.³ And a proceeding against a party by a mere fictitious name will be a nullity.⁴ But in case of misnomer, if the summons is served on the party intended, and he fails to appear, or, appearing, fails to object, the judgment or decree against him will be binding.⁵ Consent cannot confer jurisdiction of subject-matter.⁶

Astor, 2 How. (U. S.) 319, 340; Morrow v. Weed, 4 Iowa, 77, 66 Am. Dec. 122; Thompson v. Tolmie, 2 Pet. (U. S.) 157, 169; Todd v. Dowd, 1 Met. (Ky.) 281; Pursley v. Hays, 22 Iowa, 11, 92 Am. Dec. 850; Boswell v. Sharp, 15 Ohio, 447; Walker v. Morris, 14 Ga. 328; Elliott v. Peirsol, 1 Pet. 328, 340; Dingledine v. Hershman, 53 Ill. 280; Beauregard v. New Orleans, 18 How. (U. S.) 497.

¹ Rorer, Jud. Sales, § 64; Goudy v. Hall, 30 Ill. 109; Southern Bank v. Humphreys, 47 Ill. 227; Parker v. Kane, 22 How. 1, 14; Shriver's Lessee v. Lynn, 2 How. 43; Alexander v. Nelson, 42 Ala. 462; Thompson v. Tolmie, 2 Pet. 157, 165; Covington v. Ingram, 64 N. C. 123; Beauregard v. New Orleans, 18 How. (U. S.) 341; Sheldon v. Newton, 3 Ohio St. 494; Myer v. McDougal, 47 Ill. 278; Wilson v. Wilson, 18 Ala. 176; Carter v. Waugh, 42 Ala. 452; Rhode Island v. Massachusetts, 12 Pet. (U. S.) 657; Simpson v. Hart, 1 Johns. Ch. 91; Grignon's Lessee v. Astor, 2 How. (U. S.) 319, 340.

² Miller v. Handy, 40 Ill. 448; Osgood v. Blackmore, 59 Ill. 261; Barnett v. Wolf, 70 Ill. 76; Harris v. Lester, 80 Ill. 307; Goodkind v. Bartlett, 153 Ill. 419, 423, 38 N. E. 1045.

³ Schmidt v. Thomas, 33 Ill. App. 109; Sossman v. Price, 57 Ala. 204; Goodkind v. Bartlett, 153 Ill. 419, 423, 38 N. E. 1045; 17 Am. & Eng. Ency. of Law, 493, note 2.

⁴ Marsh v. Astoria Lodge, 27 Ill. 421; Goodkind v. Bartlett, 153 Ill. 419, 423, 38 N. E. 1045.

⁵ Ada Street M. E. Church v. Garnsey, 66 Ill. 132; Pond v. Ennis, 69 Ill. 341; Pennsylvania Co. v. Sloan, 125 Ill. 72, 17 N. E. 37, 8 Am. R. 337; Goodkind v. Bartlett, 153 Ill. 419, 423, 38 N. E. 1045.

⁶ Richards v. L. S. & M. S. Ry. Co., 124 Ill. 516, 16 N. E. 909; Leman v. Sherman, 18 Ill. App. 368; Biegler v. Mer. Loan & T. Co., 164 Ill. 197, 45 N. E. 512; Robertson v. Wheeler, 162 Ill. 566, 44 N. E. 870; Sanders v. Pierce, 68 Vt. 468; Peak v. People, 71 Ill. 278; Fleischman v. Walker, 91 Ill. 318; Hoagland v. Creed, 81 Ill. 506; Cobb

The word "void" is frequently improperly applied to a judicial sale which is merely "voidable," but accurately speaking the term "void" should only be applied where the sale has no force or effect whatever. The proceeding, to justify this designation, should have no form or effect whatsoever, and be incapable of confirmation or ratification. Such a proceeding may properly be said to be utterly void.¹ "Another test of a void act or deed is, that every stranger may take advantage of it, but not of a voidable one. Again, a thing may be void in several degrees: 1st. Void, as if never done, to all purposes, so that all persons may take advantage thereof. 2d. Void to some purposes only. 3d. So void by operation of law that he that will have the benefit of it may make it good."² The judges in writing their opinions frequently, by a slip of the pen, use the word "void" when they should say "voidable." For example, the chancellor of New Jersey, in speaking of the effect of by-bidding, or puffing, says: That in all cases where the bid next preceding that of the purchaser is that of a puffer, who is bidding to run up the price without any intention to pay, the sale is void.³

§ 590. Who may attack master's sale.—The general rule is that, in order to entitle one to attack a judicial sale, he must be injuriously affected by the error of which he complains. An attack must be by one who had an interest at the time of the sale and who is injured by the sale. A stranger, subsequent assignees and parties not injuriously affected by the act complained of will not be heard to complain.⁴ A stranger, a party not in interest, will not be heard to object to the confirmation of a sale.⁵ Some courts have held that all parties interested in the subject-matter may object to the confirma-

v. People, 84 Ill. 511; Bishop v. Nelson, 83 Ill. 601; Fahs v. Darling, 82 Ill. 142.

¹ Boyd v. Blankman, 29 Cal. 19, 87 Am. Dec. 146.

² Anderson v. Roberts, 18 Johns. 515, 527, 9 Am. Dec. 285; Freeman, Void Judicial Sales, § 1.

³ National Bank v. Sprague, 20 N. J. Eq. 159.

⁴ Shaw v. Lindsay, 46 Ala. 290; Miller v. Carnall, 22 Ark. 274; Mobile

Cotton Press, etc. Co. v. Moore, 9 Porter (Ala.), 679; Aderholt v. Henry, 82 Ala. 541, 3 So. 114; Cohen v. Menard, 136 Ill. 120, 24 N. E. 604; American Ins. Co. v. Oakley, 9 Paige, 259; Galbreath v. Drought, 29 Kan. 711.

⁵ Glassell v. Wilson, 4 Wash. (U.S.) 59, 60; Frink v. Morrison, 13 Abb. Pr. 80; McLaughlin v. Bradford, 82 Ala. 431, 2 So. 515; Bachle v. Webb, 11 Neb. 423.

tion of a sale whether parties to the suit or not.¹ A court of equity will not, at the instance of a stranger, inquire into and declare a judicial sale invalid for a defect, which, at most, made it voidable only and not absolutely void.² The question sometimes arises as to how far the court will, of its own motion, interfere with a sale made under its order. That the court may do so in all cases where there exists just ground for vacating the sale, probably will not be questioned, but whether the court will, in a given case, exercise such power, where all parties in interest are willing to waive the error, is a different question. In an Illinois case it was held that no matter how irregular a sale may be the court will not disturb it unless asked to do so by some person who has an equity of his own to protect.³ It may be safely said that it must be a strong case that would induce a court to vacate a sale of its own volition, where all parties are content to allow its confirmation. This rule, however, has no application to cases where some of the parties injuriously affected by the sale are infants. In such cases it is the duty of the court, as universal guardian of infants, of its own motion, if the interests of the infants require it, to vacate the sale.⁴

§ 591. **How master's sale may be attacked.**—There are four different methods of attacking a judicial sale; that is, there are four several ways of presenting the question to the court whether or not the sale shall be set aside or vacated. They are as follows:

First. By a motion to vacate the sale and order a resale.

Second. By a petition to the court for the same purpose.

Third. By filing objections or exceptions to the master's report of sale and by this means resisting its confirmation.

Fourth. By a bill in chancery for that purpose.

In the first three the remedy is sought in the same suit in

¹ *Cohen v. Menard*, 136 Ill. 130, 24 N. E. 604. See other cases cited in 12 Ency. Pl. & Pr., p. 82, note 7.

² *Durham v. Heaton*, 28 Ill. 264, 272, 81 Am. Dec. 275; *Clark v. Glos*, 180 Ill. 556, 569, 54 N. E. 631, 72 Am. St. R. 223.

³ *Beach v. Shaw*, 57 Ill. 17, 24.

⁴ *Lefevre v. Laraway*, 22 Barb. 167;

² Story, Eq. Jur., §§1 887, 1353 *et seq.*; Rorer, Jud. Sales, §§ 545, 1085; *Seaman v. Riggins*, 1 Green, Ch. (N. J. Eq.) 214, 34 Am. Dec. 200; *Howell v. Hester*, 3 Green, Ch. (N. J. Eq.) 266; *Hamburg Mfg. Co. v. Edsall*, 1 Halst. Ch. (N. J. Eq.) 249; *Curtis v. Ballagh*, 4 Edw. Ch. 635.

which the order of sale was entered, but the last involves the necessity of an independent suit. These several methods of procedure will be examined in their order and some suggestions made as to each; and,

First. Of a motion to vacate the sale and order a resale.

The following illustrations are given: A party desiring to attack a sheriff's sale on the ground of inadequacy of price, and that the property was sold *en masse*, should do so by motion in the court from whence the execution issued, and before the period of redemption has elapsed. If he delays until the purchaser obtains his deed and then appeals to a court of equity for relief, all mere irregularities will be held to have been waived. To obtain relief in a court of equity, after such delay and failure to act by motion, he must show a strong case of fraud or oppression.¹ To vacate a sale on the ground of mere irregularities the party must apply by motion, in apt time, to the court from which the execution issued, to have the levy and sale set aside. Such remedy is complete and adequate.² The same rule applies to a sale made by a master. If a party has notice of irregularities and fails to move to vacate the sale, and after the period for redemption has elapsed comes into a court of equity, by bill, for relief, it will be held that all rights for relief on *such grounds* are waived.³ If the master sells at an improper time, or in such a manner as to prevent a fair competition, or if for any other cause it would be inequitable to permit the sale to stand, the proper remedy is by a summary application to the court, in the suit in which the decree of sale was made, to set aside the sale and for a resale of the premises upon such terms and conditions as may be just, so as to protect the rights of the purchaser as well as the rights of the parties interested in the sale.⁴ Such questions should be litigated in this manner, by motion or petition rather than by an independent suit, for it would seriously affect the interests of those whose property is sold by masters if it was

¹ Clark v. Glos, 180 Ill. 556, 573, 574, 54 N. E. 631, 72 Am. St. R. 223; Ferguson v. Woodworth, 44 Ill. 374, 378.

² Clark v. Glos, 180 Ill. 556, 570, 54 N. E. 631, 72 Am. St. R. 223; Morgan v. Evans, 72 Ill. 586, 22 Am. R. 154;

2 Freeman on Executions, § 309.

³ Clark v. Glos, 180 Ill. 556, 570, 54 N. E. 631, 72 Am. St. R. 223; Watt v. McGalliard, 67 Ill. 513; Richey v. Merritt, 108 Ind. 347, 9 N. E. 368.

⁴ Brown v. Frost, 10 Paige, 243, 246.

understood that, as a rule, questions of the above kind were to be litigated and determined in an independent proceeding. For no man of ordinary prudence would bid what he believed to be the fair cash value of property at a master's sale if he expected to be subjected to the expense and delay of a protracted chancery suit to determine whether the proceedings of the master had been strictly regular.¹

Second. Sometimes the method of attacking a judicial sale is by a petition instead of by motion, but the difference consists wholly in the form in which the question is presented to the court. In one case the party *moves* the court to vacate the sale, stating his reasons or grounds of such motion, and, in the other case, he *petitions* the court to do the same thing, presenting the grounds relied upon in his petition. The supreme court of Mississippi state the correct practice to be, where the original suit is still pending and undetermined, to present the question to the court by petition.² The principles applicable to both of these methods of raising the question being precisely the same, and the difference so slight, consisting, as it does, purely in the form of presenting the matter to the court, it is unnecessary to enlarge upon the subject further.

Third. Another and perhaps the most common method of attacking a judicial sale is by filing objections, or exceptions as they are sometimes called, to the report of sale, and in this manner resisting its confirmation.

Any ground or reason why the sale should be set aside and a resale ordered, which could be properly presented by a motion or petition, may be urged in the form of an objection to the report of sale. Some of the rules applicable to exceptions filed to a general report of a master, as given in a former part of this work, have no application to a master's report of sale. For example, it is there stated that exceptions can only be taken to matters shown on the face of the report,³ whereas, in filing objections to a report of sale, matters may be stated and relied upon which do not appear on the face of the report, and which require evidence to substantiate them. But many of the principles governing exceptions to the general report of a

¹ *Brown v. Frost*, 10 Paige, 248, 455. See also *Ayers v. Baumgarten*, 246. 15 Ill. 444.

² *Henderson v. Herrod*, 23 Miss. 434, ³ *Ante*, § 446.

master are equally applicable here. For example, it is an indispensable rule that an exception must be definite and certain. The same rule applies to exceptions to a master's report of sale as to those taken to any other report. They must specifically point out the error relied upon.¹ "The well recognized doctrine is that exceptions partake of the nature of special demurrers, and hence, as the authorities say, the party excepting must 'put his finger on the error,' that the court may see what it has to decide."² Such exceptions must also be taken in time. It is too late to attempt to take them for the first time in the upper court,³ but no exceptions are necessary where the report is erroneous upon its face.⁴

§ 592. How master's sale may be attacked — Continued.— Unlike the case of an ordinary reference the master does not prepare and submit to counsel a draft of his report, but, upon the making of the sale and the distribution of the proceeds in accordance with the order of the court, prepares and files at once his report. Objections to the approval of such report are prepared by counsel and are filed with the clerk of the court. These objections must, of course, like all others, be varied to suit the facts and circumstances of each particular case. The following form, taken from a case that went to the supreme court of Illinois, is given as a sample:

Objections to Approval of Report of Sale.

STATE OF ILLINOIS, County of Sangamon.	}	In the Circuit Court of Sangamon County. ss. To the October Term thereof, A. D. 1861.
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Charles H. Allen v. Amelia Allen, Quintus Tibbs, Amelia Jane Tibbs, et al.	}	In Chancery.
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Said defendants, Quintus Tibbs, and Amelia Jane Tibbs, his wife; Amelia Allen, widow, etc. (naming the other defend-

¹ See *ante*, § 456 *et seq.*

² *Id.*

³ *Cralle v. Cralle*, 84 Va. 198, 6 S. E. 12; *Hildreth v. Turner*, 89 Va. 858, 866, 17 S. E. 471.

⁴ *Id.* See also *ante*, § 459.

ants), except to the report of Erastus Wright herein filed, for the following reasons:

First. That there is now pending in the supreme court of this state, as shown by affidavit herein filed, a writ of error presented to reverse the decree herein for the errors set forth in said affidavit; and the existence of those errors in this record, and the pendency of such writ of error, are sufficient reasons why said report should not be approved.¹

Second. The parties to this cause, by deaths and intermarriages, have been changed, and no proper parties to said cause are now in court, or properly in this record.

Third. No order approving said report should be made without bringing, by proper bill, before the court, the parties in interest whose names are disclosed by said affidavit.

Fourth. No proper notice has been given to the parties in interest of the presenting said report for approval.

Fifth. Said report should not now be approved after the great length of time that has passed since said pretended sales.

Sixth. There is no proper evidence that said pretended sales were ever advertised.

Seventh. Said proceedings, as appears by the record, are in many respects erroneous, and are void, and did not authorize a sale of said premises.

Eighth. No attempt is made to account for the delay in reporting such pretended sales.

Ninth. The commissioner, after retaining the proceeds of sales for many years, now asks a confirmation of sales without accounting for delay.

Tenth. Such report is in other respects illegal and insufficient.

E. B. HERNDON & GRIMSHAW,

For above parties.²

¹ Allusion is here made to the case of *Tibbs v. Allen*, then pending in the supreme court and afterward, at the January term, 1862, decided, reversing the decree of the court below. See 27 Ill. 119.

² See *Tibbs v. Allen*, 29 Ill. 535, 538. In this case a number of sales were made by the commissioner, different parcels of the property being sold at different times. The case was stricken from the docket and, after it had remained off the docket for about ten years, was reinstated and a motion made to confirm the report of sales. Of the whole matter the attorneys for plaintiffs in

error say: "The whole proceeding was a budget of blunders, and those who got it up were ashamed to face the parties in interest in this court. The names of parties will be found to have been changed at almost every step, and the whole proceeding is without legal sanction. We can refer to no authorities on this point, because the attempt is one of 'first impression.' There is no other case like it." The foregoing objections to the report of sales were prepared by E. B. Herndon and Jackson Grimshaw, two of the ablest attorneys in the state.

§ 593. How master's sale may be attacked — Continued. The following form, adapted from a recent Illinois case,¹ combining, as it does, the characteristics of a motion, petition to vacate, and objections to the confirmation of the master's report of sale, is a safe one to follow, in a case where a party seeks his remedy by a summary proceeding, instead of proceeding in equity:

Objections and Petition to Vacate Sale with Request to Refer the Matter to a Master.

STATE OF ILLINOIS,	{	ss.	In the Circuit Court of Cook County. To the January Term thereof, A. D. 1890.
County of Cook.			

William H. Peters, Receiver,	{	Gen. No. 62,375. In Chancery.
Robert W. Hyman, Jr., et al.		

Objections to Confirmation of Sale and Petition to Vacate Same.

And now come the undersigned objectors, who are each defendants in said cause, and jointly and severally object to the confirmation of the master's report of sale filed herein, January 10, 1890, and jointly and severally move and petition the court to reject the bid of \$602,000 of George M. Bogue, therein mentioned, and to disapprove and vacate the sale of section 21, of the town of Cicero, therein reported as having been made to said Bogue on the 21st day of December, 1889, and to order a resale of said premises in the above case, in conformity with the decree of sale entered therein, upon such terms as to the court may appear proper, and in accordance with the interests of the parties.

And as the grounds of said motion and petition show the court:

First. For that the said, etc.

Second. And for that the said, etc.

Third. And for that the said, etc.

And said defendants make said George M. Bogue and the complainant respondents to this petition, and also move the court for an order requiring said defendants to answer this petition, but not under oath, by a short day to be fixed by the court, and to refer the matter of defendants' objections to said sale and this petition to a master in chancery of this court, to hear such proof as may be submitted by said defendants and said complainant and said Bogue, under such order and direc-

¹ Barling v. Peters, 134 Ill. 606.

tion, as to the examination of witnesses and production of papers and documents, as to the court may seem meet; but that such order include a direction to said Bogue and complainant to appear for examination, and to produce before the said master for inspection of counsel for defendants, all contracts, memoranda in writing, books and letters, in the possession or control of them or either of them, relating to or connected with the negotiation for section 21, or with the action of said George M. Bogue, or H. B. Bogue, of the firm of Bogue & Hoyt, of which firm the said George M. Bogue is the senior partner, or the action or negotiation of said George M. Bogue, or said firm of Bogue & Hoyt, with said complainant; and that the said Bogue also produce before said master all letters, papers and contracts in his possession and control relating to said negotiations and purchase, either with said complainant or any of the promoters of said corporation, especially with E. T. Jeffery and W. T. Block; and that said master make due report to this court in that behalf, so that this motion may be heard by this court upon the evidence to be orally taken with all convenient speed; or that the court in its discretion set down the said matters and things before the court for hearing on oral evidence, and that all necessary orders may be entered from time to time by the court which the nature of the petitioners' case may require.

HENRY A. BARLING, Ex'r.
 HENRY A. BARLING,
 EDWARD D. MANDELL, } Trustees.
 EDWARD H. GREEN,
 and ROBERT W. HYMAN, Jr., Adm'r.

By Paddock & Wright, Solicitors.

STATE OF ILLINOIS, }
 County of Cook. } ss.

George L. Paddock, being duly sworn, deposes and says that he is solicitor of said above named defendants and petitioners, and that he has read the above and foregoing petition, and that the matters and things therein set forth and stated are true to the best of his knowledge, information and belief.

GEORGE L. PADDOCK.

Subscribed and sworn to before me, this 15th day of January, A. D. 1890.

HENRY BEST, Clerk.

§ 594. How master's sale may be attacked — Continued.
Fourth. The fourth and last method of attacking a judicial sale is by an original bill in chancery filed for that purpose. In some cases this course is simply preferable, while in others it is absolutely necessary, being the only remedy left open to the party who feels himself aggrieved.

In all cases where the ground relied upon to vacate the sale involves a charge of fraud, against either a party interested in selling the property, those interested as purchasers, or against the officer conducting the sale, the party aggrieved may avail himself of his summary remedy by motion or petition in the court ordering the sale, or he may proceed by bill in equity. In this class of cases courts of equity have concurrent jurisdiction, founded upon its general right to relieve parties from the consequences of fraud, accident or mistake.¹ In such cases the party does not forfeit his right to proceed in equity by his failure to avail himself of his summary remedy by motion or petition.² In other cases it is also held that where the proceedings are regular upon their face, and extrinsic evidence is required to show their invalidity, a court of equity is the proper tribunal to afford effectual relief.³ In such cases a bill in equity is better adapted for the investigation of the issues than a motion.⁴

As examples of cases where a party's only remedy is by a bill in equity may be mentioned the following: Where the original suit in which the sale was ordered is finally determined, and the term of the court passed, the only remedy is by bill; but in such a case, where the ground of complaint is a mere irregularity, even this remedy is denied where the party had knowledge of the matter relied upon as ground for vacating the sale, or by the exercise of reasonable diligence might have obtained such knowledge in time to present it, by motion or otherwise, in the original suit.⁵ Again, the original suit may not have been disposed of, yet the vacation of the sale may involve the rights of third persons who have acquired an interest in the property, and who can only be brought before the court by an original bill. Even after the order of confirmation is entered and at any time prior to the final termination of the suit, on motion for that purpose, the court, for proper cause, may set aside the order of confirmation and

¹ *Schroeder v. Young*, 161 U. S. 834, 345, 16 Sup. Ct. R. 512; *Graffam v. Bullen v. Dawson*, 189 Ill. 633, 29 N. E. 1038.

Burgess, 117 U. S. 180, 6 Sup. Ct. R. ² *Cooks v. Izard*, 7 Wall. 559, 562.

686; *Stewart v. Croes*, 5 Gilm. (Ill.) ³ *Robb v. Vos*, 155 U. S. 13, 38, 15 Sup. Ct. R. 4.

442; *Ballance v. Loomis*, 22 Ill. 82; ⁴ *Freeman on Executions*, sec. 297.

Morris v. Robey, 73 Ill. 462, 465; *Jenkins v. Merriweather*, 109 Ill. 647; ⁵ *Henderson v. Herrod*, 23 Miss. 484.

order a resale.¹ But where the suit is finally disposed of the court has no power to set aside its order of confirmation. A motion can only be made in a pending suit, but the fact that all power of the court to vacate the order of confirmation by this means is terminated does not, in all cases, deprive an aggrieved party of relief. Cases may and do frequently arise, where a party did not know at the time of the confirmation, or was prevented by accident, or other good cause, from exhibiting, if he did know, the causes for which a confirmation of the sale should have been refused and the sale set aside. In such a case he should not be, and is not, deprived of relief. The same principles which authorize a court of equity to relieve against iniquitous and unconscientious judgments apply as well in this case as to relief against a judgment at law, and the same causes which would justify relief in the latter case would entitle him to relief in the former.²

A motion to set aside a sale only brings before the court the parties to the judgment or decree under which the sale was made. Where a party has been induced by fraud not to redeem within the statutory period, and the rights of third parties have intervened, his remedy is by bill in equity to impeach the sale or for a decree that he be allowed to redeem therefrom.³

A party must be careful to distinguish between cases where a court of equity has concurrent jurisdiction, as explained above, and those where the remedy must be sought by a summary proceeding in the original action in which the sale was ordered, the latter course being necessary in all cases where the ground relied upon is a mere irregularity in proceedings. There may be good reasons why this course could not be pursued, and if so, they must be stated in complainant's bill and sustained by proof. If a party to a suit fails to file any objection to a master's report of sale or to make a motion to vacate, and comes into a court of equity by bill asking for relief after

¹ Henderson v. Herrod, 23 Miss. 434, 454.

² Id.

³ Henderson v. Harness, 184 Ill. 520, 523, 56 N. E. 786; Day v. Graham, 1 Gilm. (Ill.) 435; Jenkins v. Merri-

weather, 109 Ill. 647; Clark v. Glos, 180 Ill. 556, 54 N. E. 631, 72 Am. St. R. 223. For form of bill attacking sale on account of fraud on part of purchaser, see Carson v. Law, 2 Rich. Eq. 296.

the time for redemption has expired, he must be prepared to show fraud or oppression, that substantial injury resulted therefrom, and also a reasonable excuse for the delay.¹ In a New York case a mortgagor, who was dissatisfied with the sale on the ground of inadequacy of price, made application to the court to vacate the sale and then, for some reason, abandoned his motion and filed an original bill in chancery seeking to accomplish the same purpose. Chancellor Walworth spoke of this as an "unheard of expedient of filing an original bill to obtain a resale of mortgaged premises under the decree in the former suit."²

§ 595. **Attacking the master's report of sale — The hearing.**— Whether the attack is by motion, petition or by filing objections to the master's report of sale, the hearing can only be had after notice is given, by the moving party, to all parties in interest.³ Of course this includes the necessity of giving notice to the purchaser.⁴ It is indispensable that the purchaser shall have notice of the motion.⁵ But in this, as in all other cases where notice is required, by appearing and taking part in the proceedings, a party waives the necessity of notice, as well as its sufficiency both as to form and length of time.⁶

All presumptions are in favor of the validity of the sale, and the burden of proof rests on the objector. He must establish the truth of the allegations relied upon by clear and satisfactory evidence.⁷ It follows, therefore, the burden of proof being upon the objecting party, that he has the right to open and close the argument — the same rule obtains here as in case of exceptions to a master's general report.⁸ The presumption

¹ *Fergus v. Woodworth*, 44 Ill. 374, 379.

² *Brown v. Frost*, 10 Paige, 243, 248.

³ *Dugger v. Tayloe*, 60 Ala. 504; *Perkins v. Gridley*, 50 Cal. 97; *Nugent v. Nugent*, 54 Mich. 557, 20 N. W. 584; *Patterson v. Eakin*, 87 Va. 49, 12 S. E. 144; *Lyster v. Brewer*, 13 Iowa, 461; *Sears v. Low*, 7 Ill. 281; *Bent v. Maupin*, 86 Ky. 271, 5 S. W. 425; *McKinney v. Jones*, 7 Tex. 598, 58 Am. Dec. 83.

⁴ *Eckstein v. Calderwood*, 34 Cal. 658; *Day v. Graham*, 6 Ill. 435; *Osborn v. Cloud*, 21 Iowa, 238; *Jewitt v.*

Marshall, 3 A. K. Marsh. (Ky.) 153;

Butts v. Chinn, 4 J. J. Marsh. (Ky.)

641; *Toler v. Ayres*, 1 Tex. 398; *Mc-*

Kinney v. Jones, 7 Tex. 598, 58 Am. Dec. 83.

⁵ *Dunning v. Dunning*, 37 Ill. 306;

Comstock v. Purple, 49 Ill. 158, 167.

⁶ *Pewabic Mining Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. R. 887. See *ante*, § 186 *et seq.*

⁷ *Egan v. Grece*, 79 Mich. 629, 45 N. W. 74; *Robinson Notion Co. v. Foot*, 42 Neb. 156, 60 N. W. 316; *Wallace v. Berger*, 25 Iowa, 456.

⁸ See *ante*, § 477.

being in favor of the validity of the sale, it follows, also, that, if the matters relied upon as ground for vacating the sale are not disclosed by the record, the burden rests upon the objector to establish them by proof. The usual practice is to establish such facts by affidavits.¹ The court may decline to hear witnesses, the practice being to try the questions involved upon affidavits;² yet, if it were shown to the court that the question could not be fairly presented by affidavits, the court might hear witnesses.³ The parties knowing the facts might be interested in having the sale confirmed, and, for that reason, might decline to make voluntary affidavits, and thus force the court to hear them in open court. It is perhaps unnecessary to add that a part of the evidence may be submitted in the form of affidavits and the remainder by the oral testimony of witnesses produced in court, and that counter-affidavits are admissible on the part of those interested in maintaining the validity of the sale.⁴

On the hearing of a motion or petition to vacate a sale, or upon the hearing of objections to the confirmation of the master's report of sale, the only questions that can be raised must relate to the regularity of the proceedings in the execution of the decree of sale. No question can be raised as to the validity of the decree of sale, or upon any of the proceedings prior thereto.⁵ That is to say, in such a case the only question is whether the master properly discharged the duties imposed upon him by the order of sale, or, more properly speaking, whether any irregularity has intervened in the execution of such order, which has affected a party injuriously, and of which he has a right to complain? On a motion to confirm a sale it is

¹ *Comstock v. Purple*, 49 Ill. 158. On the admissibility and construction of affidavits, see *ante*, §§ 244, 245; and as to the weight to be given to opinion evidence in general, see *ante*, § 355.

² *Barling v. Peters*, 184 Ill. 606, 25 N. E. 765.

³ *Id.*

⁴ *Id.*

⁵ *Carter v. Rountree*, 109 N. C. 29, 82, 13 S. E. 716; *Farmers' Bank v. Quick*, 71 Mich. 534, 89 N. W. 752; *Cox v.*

Cox, 18 D. C. 1; *McGeorge v. Sease*, 82 Kan. 887, 4 Pac. 846; *Stratton v. Reisdorph*, 85 Neb. 814, 58 N. W. 136; *State Nat. Bank v. Scofield*, 9 Neb. 499, 4 N. W. 71; *Kimbro v. Clark*, 17 Neb. 403, 22 N. W. 788; *Nebraska L. & T. Co. v. Hamer*, 40 Neb. 281, 58 N. W. 695; *Beatrice Paper Co. v. Beloit Iron Works*, 46 Neb. 900, 65 N. W. 1059; *Hartshorn v. Mil. & St. Paul R. R. Co.*, 23 Wis. 692; *Edwards v. City of Janesville*, 14 Wis. 26.

not the duty of the court to go behind the order of sale, or to revise that order. The matters before the court, on such an application, relate solely to the transactions which took place in the attempt to execute the order and make the sale; and, in reviewing the decision of the lower court in granting the order of approval or confirmation of sale, the upper court can only consider such matters as the lower court ought to have considered.¹ This is but an application of the general rule that, where a party desires to attack the order of reference, he must do so by a direct motion for that purpose, as in no case can it be done by exceptions to master's report.² By exceptions to a master's report of sale a party cannot question the validity of orders preceding the sale. The validity of such orders cannot be passed upon in such summary way, but exceptions to the report must be confined to the report itself, and the facts therein contained upon which it is based. It is the duty of the master to obey the directions given him in the decree, and when he does so his acts are proper thereunder, and exceptions can be of no avail.³ The same general principles, laid down in a previous chapter, for conducting a hearing before the chancellor, on exceptions to a master's general report, apply with equal force, in the main, to a hearing in case of an attack upon a master's report of sale.⁴

VI. DUTY OF THE COURT.

§ 596. **Duty of the court in confirming or vacating a master's sale.**—Upon the hearing of a proceeding to vacate a master's sale, whether the question is brought on by a motion or petition or by simply resisting the motion for its confirmation, the court must do either one of two things; that is, the court must either confirm the contract as made, or it must set it aside and order a resale. There is no middle course to be pursued. The contract must stand or fall as made. The court has no power to vary its terms, that is to make a new contract and then confirm it as modified. In case a party making the highest bid and reported as the purchaser fails to com-

¹ Allen v. Shepard, 87 Ill. 314.

² Musgrove v. Lusk, 2 Tenn. Ch. 576, 579.

³ See *ante*, § 463.

⁴ See *ante*, §§ 470, 477.

plete his purchase, the chancellor has no power, even by consent of all parties, to declare the next highest bidder the purchaser.¹ In confirming or refusing to confirm a master's sale, the chancellor should not exercise an arbitrary but a sound legal discretion. What are sufficient grounds for refusing to confirm must depend in a great degree upon the circumstances of each case.² In passing on an application to vacate a master's sale the chancellor has no power to grant relief as a matter of arbitrary discretion, because of hardship, but must decide according to the general principles of equity, and, if he can find no doctrines of equitable relief to justify his interposition, the sale should not be disturbed.³

The chancellor will not usually interfere by directing a resale for the benefit of parties interested in the proceeds of a master's sale of real estate, to protect them against the consequence of their own negligence, where they are adults and perfectly competent to protect their own rights on the sale. But they have a right to presume that the master will discharge his duty in making the sale, and, where a master fails to conduct the sale according to law, and a party interested is injured thereby, he may still be heard to complain of such irregularity, notwithstanding the fact that he failed to attend such sale.⁴ In all sales of real estate made under the supervision or by order of a court of chancery, the chancellor has a broad discretion in the acceptance or rejection of bids.⁵ It is true that, in approving or disapproving sales made by a master in chancery, the chancellor is vested with a broad discretion, especially where, by the terms of the decree or provision of the statute, a deed is not to be made until after confirmation of the sale.⁶ Yet such discretion is not a mere arbitrary discretion, "but must be exercised in accordance with established principles of law."⁷ This is the true rule, and the

¹ *Blackbeard v. Lindigren*, 1 Cox's 478; *Sowards v. Pritchett*, 37 Ill. 518; Cas. 205. *Quigley v. Breckenridge*, 180 Ill. 627,

² *Henderson v. Herrod*, 23 Miss. 54 N. E. 580.
434, 453.

³ *Watt v. McGalliard*, 67 Ill. 513, 519. ⁵ *Jennings v. Dunphy*, 174 Ill. 86,

⁴ *American Ins. Co. v. Oakley*, 9 50 N. E. 1045; *Quigley v. Brecken-*
Paige, 259; *Barling v. Peters*, 134 Ill. ridge, 180 Ill. 627, 631, 54 N. E. 580.
606, 620, 25 N. E. 765. ⁷ *Ayers v. Baumgarten*, 15 Ill. 444,

⁵ *Colehour v. Roby*, 88 Ill. App. 447; *Quigley v. Breckenridge*, 180
Ill. 627, 631, 54 N. E. 580.

broad statement, sometimes made, that the court, being the real vendor, may confirm or not at its discretion, must be qualified with this definition of judicial discretion.¹ While, in a proper case, the chancellor will not hesitate to set aside a master's sale and order a resale of the premises, it must be remembered that public policy requires that there should be stability in judicial sales, and that they should not be disturbed for slight causes, otherwise property cannot be expected to bring its value at such sales.² In determining whether the court will approve a master's report of sale or not, the court must have due regard to the stability of judicial sales, yet, while it is the duty of the chancellor to allow this policy to have great influence, he must not forget that the accepted bidder at a master's sale acquires no independent right to have his purchase completed, but is nothing more than a preferred bidder, who proposes to purchase the property upon condition that the chancellor, in the exercise of his sound, equitable discretion, confirms the sale,³ and he must remember that the law recognizes a higher policy than that which stands for the stability of judicial sales,—that of maintaining their purity, and of preserving the public confidence in their entire fairness, a policy which must prevail over that of giving stability to them; and, actuated by this motive, where there has been "fraud, accident, mistake or unfairness," the court should not hesitate to withhold his approval of the report of sale.⁴ If justice demands that the sale be set aside on account of fraud, accident or mistake, it is no sufficient answer to say that the sale was conducted according to law. Mr. Justice Bradley, speaking of this contention, in a recent case⁵ says: "It is insisted that the proceedings were all conducted according to the forms of law. Very likely. Some of the most atrocious frauds are committed in that way. Indeed, the greater the fraud intended, the more particular the parties to it are to proceed according to the strictest forms of law."

¹ See Rorer, *Jud. Sales*, § 109, and cases cited in note.

² *Quigley v. Breckenridge*, 180 Ill. 627, 636, 54 N. E. 580; *Conover v. Musgrave*, 68 Ill. 58.

³ *Forman v. Hunt*, 8 Dana, 614;

Campbell v. Johnston, 4 Dana, 177, 186; *Owen v. Owen*, 5 Humph. 352, 855; *Garrett v. Moss*, 20 Ill. 449, 454.

⁴ *Garrett v. Moss*, 20 Ill. 549.

⁵ *Graffam v. Burgess*, 117 U. S. 180,

186, 6 Sup. Ct. R. 686.

§ 597. **Duty of the court — Captious objections.**— While the master in making a sale is but the agent of the court, and derives his authority to act from the decree, and should be required to substantially conform to its conditions and terms, yet, on an application to have the report of his proceedings, under the decree, confirmed, the court should not regard mere captious objections. Any slight deviation from the requirements of the decree, which has not resulted in injury to either party, should not be a cause for refusing to confirm the sale.¹ Mr. Justice Brewer, speaking for the supreme court, says that after a sale has once been made the chancellor will certainly, before confirmation, see that no wrong has been accomplished in and by the manner in which it was conducted. “Yet the purpose of the law is that a sale shall be final; and to insure reliance upon such sales, and induce bidding, it is essential that no sale be set aside for trifling reasons, or on account of matters which ought to have been attended to by the complaining party prior thereto. And in this respect regard may properly be had to all that has transpired before, for the conduct of the parties, their acts and omissions, may largely interpret their action at the time of the sale.”² Yet, in a certain class of cases, courts are compelled to enforce a more rigid rule, and vacate the sale for a reason which would be considered wholly insufficient in other cases. Thus, where the proceeding in a court of chancery is to sell real estate under the provisions of a special statute, all the provisions of the statute, including the notice of the sale, must be strictly followed, or no title will pass to the vendee, or to a subsequent *bona fide* purchaser.³ Courts also distinguish between execution sales and those made under the immediate direction of the court under decree.⁴

The English rule of opening biddings on a master's sale, which was almost a matter of course, upon the offer of a reasonable advance on the amount bid, if the motion was made before

¹ Garrett v. Moss, 20 Ill. 549, 554.

² Pewabic Mining Co. v. Mason, 145 U. S. 849, 856, 12 Sup. Ct. R. 887.

³ Haywood v. Collins, 60 Ill. 828,

⁴ 886. See also Thatcher v. Powell, 6 Wheat. 119, and cases there cited.

⁴ Pomeroy, Eq. Jur. 444; Busey v. Hardin, 2 B. Mon. 407; Foreman v. Hunt, 3 Dana, 614; Owen v. Owen, 5 Humph. 852.

confirmation of the report, has not obtained in this country. The rule here seems to be, if it be shown there has been any injurious mistake, misrepresentation or fraud, the biddings will be opened, the reported sale rejected, or the order of ratification rescinded, and the property again put into the market and resold.¹ So, too, the English practice of keeping the biddings open at a master's sale, in order that there may be advances on a bid received by a master, which he reports to the court, by which no one can be a purchaser, but a mere bidder, until a final confirmation by the chancellor, is not followed in this country, but a valid and binding contract of sale is made, that is, in sales under executions, when the hammer falls, which can only be avoided by proof of fraud, mistake or some illegal practice.² While it is not the practice to refuse biddings in this country, it is not to be doubted that here, as in England, the chancellor has a "large discretion, limited only by some equitable considerations, in the approval or disapproval of sales made by his master."³

In an Illinois case the court say: "While courts of justice will watch over these sales with a jealous eye, with a view to the discovery of fraud, or of such gross irregularities as shall amount thereto, they will not, and ought not, where the order of the court has been faithfully observed, in the absence of fraud, disturb the sale."⁴ It may here be added that it is held in motions for new trials at law, that, while any single ground relied upon may be alone insufficient reason for disturbing the verdict, yet the combined force of two or more of the grounds relied upon may be amply sufficient. The same principle applies to motions to vacate judicial sales. Any one of the grounds urged by the complaining party may, taken by itself, not require the court to set aside the sale, while the combined force of the whole of the causes relied upon may justify the court, in the exercise of its sound discretion, in vacating the

¹ Cooper v. Crosby, 8 Gilm. (Ill.) 506; Comstock v. Purple, 49 Ill. 158, 168.

² Jackson v. Warren, 32 Ill. 331, 342; Comstock v. Purple, 49 Ill. 158, 169.

³ Garrett v. Moss, 20 Ill. 549, 554.

⁴ Comstock v. Purple, 49 Ill. 158,

167. In this case the court further add that "though the land might possibly be worth one hundred per cent. more than the sum actually bid for it, and for which it was sold, that was not sufficient to justify the court in setting aside the sale."

sale. Thus, inadequacy of price and the fact that the officer erred by selling the property in gross may both be urged as reasons for vacating the sale, and, taken together, may be good cause for so doing, when either one, taken by itself, would be insufficient.¹

§ 598. **Duty of the court as affected by the right of redemption.**— In judicial sales, where property is sold with right of redemption on part of the owner or others, it is a well known fact that, unless where necessary to secure the debt, it rarely sells at anything approximating its real value. Such purchases are not looked upon as desirable investments, and there is seldom any competition, the creditor generally being forced to bid in the property in satisfaction of his debt and wait for the debtor or some other creditor to redeem.² In such cases, where the property is incapable of division and the debt small as compared with its value, it necessarily follows that the purchase price is “grossly inadequate,” but to set the sale aside for this reason would be unreasonable, unless the court undertakes to force the creditor to pay something near value for what he does not want and thus remove the incentive on the part of the debtor to redeem. The better rule, under such circumstances, is for the court to confirm the sale and allow the owner to prevent a sacrifice of his property by redeeming. Therefore, the fact that the price paid by a purchaser is inadequate constitutes no just ground of complaint where the property is sold subject to redemption, as “it is obvious the less that is bid upon the property the more favorable it is” to the party having the right to redeem.³ For this reason the fact that a party had the right to redeem his property under the statute and failed to avail himself of such right within the period allowed by law, often becomes an important factor in determining whether or not the sale should be vacated. It is true that there are some grounds of attack, and most grounds under certain circumstances, which are not waived by a failure to redeem, but, as a rule, in all cases where a party has knowledge of an irregularity, and can save himself from loss by redeem-

¹ *Douthett v. Kettle*, 104 Ill. 856.

² *Dobbins v. Wilson*, 107 Ill. 17, 25.

³ *Watt v. McGalliard*, 67 Ill. 518, See *post*, § 610.

ing, he will not be heard to complain after the time for redemption has expired.¹

Where the complaining party is ignorant of the ground of attack, without fault on his part, until the period of redemption has expired, the fact that he failed to redeem will be no bar to his relief in equity. Especially is this true in a case where a knowledge of the ground of relief is fraudulently kept from the complainant. Thus, in a case where the party interested in maintaining the sale is guilty of fraudulent practices, whereby a knowledge of the ground of attack is withheld from the party having the right to redeem, the fact that he fails to redeem within the statutory period constitutes no bar to relief in equity.² While in some cases a failure to redeem within the statutory period constitutes an absolute bar to relief in equity, yet, in others, where the circumstances otherwise appeal to the conscience of the chancellor, relief will only be granted upon equitable terms. Thus, in an Illinois case, where the party permitted the period of redemption to expire without redeeming, and did not apply to a court of equity for relief until ten months afterward, the court held that, while it is true, as a general rule, where a party desires to make application to vacate a judicial sale, he ought to do so before the time of redemption expires, yet, as the bill was not one strictly to vacate a sale, but prayed for leave to redeem from the sale, it was proper to grant the relief asked upon equitable terms.³ In another case, where the party seeking relief, for some three years slept on his rights, neither redeeming by paying the paltry sum required for that purpose, nor attempting to avoid the sale, the court held that as equity favors vigilance, and will not encourage litigious inclinations of individuals, the complainant must be ready to do equity, and, therefore, the court would only grant the relief prayed for, upon equitable terms.⁴

¹Love v. Cherry, 24 Iowa, 204; time of redemption, see Stewart v. Abbott v. Peck, 35 Minn. 499, 29 N. Croes, 5 Gilm. (Ill.) 442.
W. 194; Power v. Larabee, 3 N. Dak. ²Haworth v. Taylor, 108 Ill. 275, 502; Raymond v. Holborn, 23 Wis. 286. For a full discussion of the waiver of relief in equity by failure to redeem, see *post*, §§ 610, 614.
57, 99 Am. Dec. 105; Richey v. Merritt, 108 Ind. 347, 9 N. E. 368; Clark v. ³Lurton v. Rodgers, 189 Ill. 554, 562, 29 N. E. 866, 32 Am. St. R. 214.
Glos, 180 Ill. 556, 574, 54 N. E. 631, 72 ⁴Stoker v. Greenup, 18 Ill. 27.
Am. St. R. 223. For good excuse for not filing bill before expiration of

VII. GROUNDS OF ATTACK.

§ 599. Want of or insufficiency of notice.— The grounds of attacking judicial sales are so various that it is not practicable, in the limited amount of space that can be here devoted to the subject, to even enumerate them, but some suggestions are offered, in the following sections, upon the most important ones, at least those of most frequent occurrence; and first, want of or insufficiency of the notice of sale. In previous sections of this chapter ¹ the necessity and importance of the notice of sale are fully discussed, and it is also there shown what such a notice should properly contain, so that it only remains for us to examine here what is to be done in case the sale is attacked upon the ground of a want of or an insufficient notice. As property to a vast extent is sold under the decrees and orders of the court, much of which property belongs to infants, and others who are not able to protect their own rights, it has always been an important object with the courts to encourage a fair competition at masters' sales. For this purpose it is necessary that purchasers at such sales should understand that no deception whatever will be permitted to be practiced upon them. That, in a contract between them and the court, they will not be compelled to carry that contract into effect under circumstances where it would not be perfectly just and conscientious in an individual to insist upon the performance of the contract against the purchaser, if the sale had been made by such individual or his agent. It is therefore a principle of the court that the master who sells the property shall not, in the description of the same, add any particular which may unduly enhance the value of the property, or mislead the purchaser. If, therefore, the master, in his notice of sale, inserts any particular which is calculated to mislead the purchaser, either as to the quality or quantity of the property to be sold, and it does in fact mislead the purchaser to his injury, the court will vacate the sale.²

A court of equity, having regard to the stability of judicial sales, will not always interfere to vacate them for want of a strict compliance with the terms of the decree in the matter of

¹ *Ante*, § 571 *et seq.*

² *Veeder v. Fonda*, 3 Paige, 94, 97.

notice, after the lapse of a considerable time; and, for that reason, in a case where no objection was made as to the manner in which the notice was given until ten years after the sale had been approved, the court refused to set the sale aside unless positive injury was shown.¹ But where the objection is seasonably made, as where it was urged before the confirmation of the master's report, the sale will not be approved if notice was not given in accordance with the terms of the decree.² If the master fails to advertise the property for the length of time required by law, or by the decree, the proper method of taking advantage of the error is by excepting to the report in the court below.³

The following furnishes a good illustration of the difference between a mere irregularity, which must be corrected by motion and which is cured by confirmation, and a case where the party's right to proceed in equity still remains, notwithstanding such confirmation. If the ground for an attack upon the validity of a sale is that the officer made the sale upon a different day from that named in the notice, and the applicant is proceeding by a bill in equity after the sale has been confirmed, such defect will be considered as cured by the order of confirmation.⁴ Hence, where a party desires to attack a sale simply on the ground that the notice given was insufficient, he must do so before confirmation.⁵ But this rule has no application where the sale was fraudulently made on a different day and where there was inadequacy of price.⁶

§ 600. *Selling en masse instead of in parcels.*—In a former part of this chapter it is shown to be the duty of the officer making the sale, in certain cases, to offer to sell the property in parcels, instead of selling the whole in a body, but some suggestions will here be made as to what the court should do in case the officer disregards his duty, and where the party aggrieved alleges such failure on the part of the officer as a ground for vacating the sale. Chancellor Kent says: "I have

¹ Garrett v. Moss, 20 Ill. 549; Quick v. Collins, 197 Ill. 391, 64 N. E. 288.

² Wilson v. Ford, 190 Ill. 614, 60 N. E. 876; Quick v. Collins, 197 Ill. 391, 64 N. E. 288.

³ Dow v. Seeley, 29 Ill. 495.

⁴ Conover v. Musgrave, 68 Ill. 58.

⁵ Wyant v. Tuthill, 17 Neb. 495; Clark v. Glos, 180 Ill. 573, 54 N. E. 631, 72 Am. St. R. 223; Freeman on Executions, sec. 304.

⁶ McConnel v. Gibson, 12 Ill. 128.

no doubt of the value and solidity of the rule, that where a tract of land is in parcels, distinctly marked for separate enjoyment, it is, in general, the duty of the officer to sell by parcels, and not the whole tract in one entire sale. To sell the parcels separately is best for the interest of all the parties concerned. The property will produce more in that way, because it will accommodate a greater number of bidders, and tends to prevent odious speculations upon the distresses of the debtor."¹ This being the plain duty of the officer, in a case where it appears that the property has been sacrificed by the neglect or mistake of the master to comply with this legal requirement, by his having improperly put up various lots together, when they should have been sold separately to have produced a fair competition among the bidders, the parties injured thereby are entitled to relief, by a resale or otherwise, so far as relief can be given without doing positive injustice to *bona fide* purchasers of the premises at the sale.² Not only by diminishing competition among bidders does the failure to sell in separate parcels tend to lessen the amount to be realized from the sale, but it also forces the debtor to redeem the whole or none, and, for this reason, may constitute good reason for vacating the sale.³

Where several tracts of land are levied on under execution, or ordered to be sold under a decree of court, it is the duty of the officer conducting the sale to offer each tract separately, and, if one separate division does not sell, to add another to it, and so on, until all the subdivisions are offered, and, if not then selling, then to offer the whole *en masse*. While the land must be sold under the execution or order of court, as the case may be, the owner has a right to insist that the sale will be so conducted that he shall not be needlessly and irreparably injured.⁴ It is not sufficient to offer the parcels separately, one after the other, but the officer first offering one lot must add another, and then another, and so on until all are offered, and if this course is not pursued and the price is inadequate, the

¹ Woods v. Monell, 1 Johns. Ch. 502. Dec. 699; Winters v. Burford, 6 Cold.

² American Ins. Co. v. Oakley, 9 328; Catlett v. Gilbert, 23 Ind. 614; Paige, 259. Rorer, Jud. Sales, § 1106.

³ Jackson v. Newton, 18 Johns. 355; ⁴ Phelps v. Conover, 25 Ill. 309, 312; Piel v. Brayer, 30 Ind. 332, 95 Am. Morris v. Robey, 73 Ill. 462, 465.

court will vacate the sale.¹ It is the unquestioned duty of the officer conducting the sale to offer the property in separate parcels if it is susceptible of division, and, in the absence of evidence to the contrary, the presumption is that he did so. Where statements in this regard are contradictory — one that he performed this official duty in accordance with the law, and the other that he failed to discharge this duty,—the court will indulge this presumption in favor of compliance with the law.² Yet, as shown in a previous section,³ where the property is described in the bill and mortgage as one tract, the master may sell it as a whole.⁴ Where the premises are offered separately and no bidders, and then struck off *en masse*, the sale, if regular in other respects, will be confirmed.⁵

The supreme court of Illinois holds that it is only on the ground of fraud, or that some one has been prejudiced by the sale of lands *en masse*, that the sale will be set aside in equity because the property was not sold in separate parcels.⁶ Although a sale may be irregular in that the officer sold the property *en masse* instead of in parcels, yet if it sold for its full value the sale is properly confirmed.⁷ This is in accordance with the universal rule that, to entitle a party to complain on the ground of an irregularity in procedure, the error complained of must be a material one, that is, there must not only have been an error committed, but the party complaining must have been injuriously affected thereby. As to who may be heard to complain of an error of this character it appears that he must be a party in interest, one who could be injuriously affected by the irregularity. Thus, in order to give a party the right to object on the ground that the lands were sold *en masse*, he must have an interest in the property. No mere intruder or trespasser will be permitted to make such objection.⁸ The party

¹ Morris v. Robey, 73 Ill. 462, 465.

² Clark v. Glos, 180 Ill. 536, 572, 54 N. E. 231, 72 Am. St. R. 223.

³ Ante, § 582.

⁴ Blazey v. Delius, 74 Ill. 299; Davis v. Dresback, 81 Ill. 393; Patton v. Smith, 113 Ill. 499.

⁵ Van Valkenburg v. Trustees, etc., 66 Ill. 103, 105; Martin v. Hargardine, 46 Ill. 322; Fairman v. Peck, 87 Ill. 156, 162.

⁶ Prather v. Hill, 36 Ill. 402, 404;

Ross v. Mead, 5 Gilm. 171; Gillespie v. Smith, 29 Ill. 473, 481; Fergus v. Woodworth, 44 Ill. 878; Hay v. Baugh, 77 Ill. 500; Fairman v. Peck, 87 Ill. 156, 162, 163.

⁷ Id.

⁸ Wimberly v. Hurst, 38 Ill. 166, 172, 88 Am. Dec. 295.

complaining and seeking to vacate a sale on the ground that the property was sold *en masse* must allege and prove that he sustained injury from such irregularity.¹ The failure of the officer to offer to sell distinct parcels is but an irregularity, and as such is cured by a confirmation of the sale,² and as such only renders the sale voidable but not void.³ To avail himself of such objection the party complaining must move in apt time. If a party fails to object to a master's report of sale, or to move to vacate the sale, but, on the contrary, allows its confirmation by the court, he cannot, after the period for redemption has elapsed, come into a court of equity and have the sale set aside on the ground that the property was sold *en masse*, but to get relief in such a case he must show fraud or oppression, and that substantial injury has resulted thereby and also show some excuse for the delay.⁴

To recapitulate the foregoing, we may say that, to justify the court in vacating the sale on this ground, it must appear:

First. That it was the duty of the officer to offer to sell the property in separate parcels, and that he failed to do so, but, on the contrary, sold the land as a whole tract.

Second. That the complaining party is a party in interest, that is, that he is interested in the proceeds of the sale, either as owner, creditor, or otherwise, and therefore can be injuriously affected by any irregularity that diminishes the amount of such proceeds.

Third. The complaining party must not have waived his right to object by laches, or otherwise; in other words, he must have raised the objection in apt time.

Fourth. It must appear that the complaining party was in fact injured by such irregularity.

§ 601. Inadequacy of price.—Inadequacy of price, as a ground for vacating a judicial sale, is not often relied upon alone, but is generally urged in connection with some other ground which produced the inadequacy; yet, in rare instances, it is presented to the court and insisted upon as the sole ground for setting aside the sale; but to justify the court in so doing,

¹ Williams v. Rhodes, 81 Ill. 571, 574.

² Emery v. Vroman, 19 Wis. 689, 700, 58 Am. Dec. 726.

³ Bozarth v. Largent, 128 Ill. 95, 21 N. E. 218.

⁴ Fergus v. Woodworth, 44 Ill. 374, 389.

in such cases, requires, as we shall hereafter see, a strong showing — one appealing to the conscience of the chancellor. The English practice was to open the biddings at a master's sale before confirmation of his report, on the offer of a reasonable advance upon the sum bid at the sale and payment of the expenses of the purchaser, the party applying to have the biddings opened being required to deposit the amount of such advance and expenses.¹ Under this practice biddings were opened for slight cause,² but this practice is not followed in this country.³ Mr. Justice Bradley, speaking for the court of the rule that prevailed in England until changed by statute in 1867, says: "It was formerly the rule in England, in chancery sales, that until confirmation of the master's report the bidding would be opened upon a mere offer to advance the price *ten per centum*." 2 Daniell's Ch. Pr., 1st ed., 924; 2d ed., by Perkins, *1465, *1467; Sugden on Vendors & Purchasers, 14th Eng. ed., 114. But Lord Eldon expressed much dissatisfaction⁴ with this practice of opening biddings upon a mere offer of an advanced price, as tending to diminish confidence in such rules, to keep bidders from attending, and to diminish the amount realized. *White v. Wilson*, 14 Ves. 151; *Williams v. Attenborough, Turner & Russell*, 75; *White v. Damon*, 7 Ves. 30, 34. Lord Eldon's views were finally adopted in England in The Sale of Land by Auction Act, 1867, 30 and 31 Vict., c. 48, § 7, so that now the highest bidder at a sale by auction of land, under an order of court, provided he has bid a sum equal to, or higher than, the reserved price, if any, will be declared and allowed the purchaser, unless the court or judges, on the ground of

v. Feners, 2 Ves. 700; 556; *Ayres v. Baumgarten*, 15 Ill. 447; *Seamen v. Giggins*, 1 Green Ch. 214; *Anderson v. Foulke*, 2 Har. & G. 348; *Duncan v. Dodd*, 3 Paige, 99.

v. Collett, 18 Price, 213; *v. Edwards*, 1 Sim. & Stu. 144, 447.

v. Schermerhorn, 1 1; *Williamson v. Dale*, 3 290; *Andrews v. Scotton*, 9; *Young v. Teague*, 1 Bal. 290; *Anderson v. Lowry*, 5 Yerg. 290; *gston v. Byrne*, 11 Johns.

⁴ In *White v. Wilson*, 14 Ves. 151. It was in this case that Lord Eldon said that "half the estates that are sold in court are thrown away upon the speculation that there will be an opportunity of purchasing afterwards by opening biddings." See Chancellor Kent, in *Williamson v. Dale*, 3 Johns. Ch. 290.

fraud or improper conduct in the management of the sale, upon the application of any person interested in the land, either opens the biddings, or orders the property to be resold."¹ In this country Lord Eldon's views were adopted at an early day by the courts, and the rule has become almost universal, that a sale will not be set aside for inadequacy of price unless the inadequacy be so great as to shock the conscience, or unless there be additional circumstances against its fairness; being very much the same rules that always prevailed in England as to setting aside sales after the master's report had been confirmed.² Mr. Justice Bradley, who makes this statement, adds that "From the cases here cited we may draw the general conclusion that, if the inadequacy of price is so gross as to shock the conscience, or if, in addition to gross inadequacy, the purchaser has been guilty of any unfairness, or has taken any undue advantage, or if the owner of the property, or party interested in it, has been for any other reason misled or surprised, then the sale will be regarded as fraudulent and void, or the party injured will be permitted to redeem the property sold. Great inadequacy requires only slight circumstances of unfairness in the conduct of the party benefited by the sale to raise the presumption of fraud."³

§ 602. Inadequacy of price — Continued.— The rule generally adopted and followed in this country is that if property

¹ *Graffam v. Burgess*, 117 U. S. 180, 191, 6 Sup. Ct. R. 686.

² *Graffam v. Burgess*, 117 U. S. 180, 190, 192, 6 Sup. Ct. R. 686, citing *Livingston v. Byrne*, 11 Johns. 556, 566 (1814); *Williamson v. Dale*, 3 Johns. Ch. 290, 292 (1818); *Howell v. Baker*, 4 Johns. Ch. 118 (1819); *Tiernan v. Wilson*, 6 Johns. Ch. 411 (1822); *Duncan v. Dodde*, 2 Paige, 99 (1830); *Collier v. Whipple*, 18 Wend. 224, 226 (1834); *Tripp v. Cook*, 26 Wend. 143; *Lefevre v. Laraway*, 22 Barb. 167, 173; *Seaman v. Riggins*, 1 Green Ch. (2 N. J. Eq.) 214; *Eberhardt v. Gilchrist*, 3 Stockt. (11 N. J. Eq.) 167; *Campbell v. Gardner*, 3 Stockt. (11 N. J. Eq.) 423; *Marlatt v. Warwick*, 3 C. E. Green (18 N. J. Eq.)

108; *Kloopping v. Stellmacher*, 6 C. E. Green (21 N. J. Eq.) 328; *Wetzler v. Schaumann*, 9 C. E. Green (24 N. J. Eq.) 60; *Carson's Sale*, 6 Watts (Pa.), 140; *Surget v. Byers*, Hempst. (U. S.) 715, Fed. Cas. 13,629; *Byers v. Surget*, 19 How. (U. S.) 303; *Andrews v. Scotton*, 2 Bland (Md.), 629; *Glenn v. Clapp*, 11 G. & J. (Md.) 1; *House v. Walker*, 4 Md. Ch. 62; *Young v. Teague*, 1 Bailey Eq. 13, 14; *White v. Floyd*, Speer's Eq. 351; *Hart v. Bleight*, 3 T. B. Mon. (Ky.) 273; *Reed v. Carter*, 1 Blackf. (Ind.) 410; *Pierce v. Kneeland*, 7 Wis. 224; *Montague v. Dawes*, 14 Allen (Mass.), 369; *Drinan v. Nichols*, 115 Mass. 353.

³ *Graffam v. Burgess*, 117 U. S. 180, 192, 6 Sup. Ct. R. 686.

is duly advertised and fairly sold by the master, in the usual manner, to a stranger to the suit, mere inadequacy of price is not a sufficient ground for depriving the vendee of the benefit of his purchase, unless the inadequacy is so great as to be evidence of fraud or unfairness in the sale.¹ Mr. Kerr, in his treatise on Fraud and Mistake, says: "Inadequacy of consideration, if it be of so gross a nature as to amount in itself to conclusive and decisive evidence of fraud, is a ground for canceling the transaction."² Chancellor Desaussure, on the same subject, says: "I consider the result of the great body of cases to be, that wherever the court perceives that a sale of property has been made at a grossly inadequate price, such as would shock a correct mind, this inadequacy furnishes a strong, and in general a conclusive, presumption, though there be no direct proof of fraud, that an undue advantage has been taken of the ignorance, the weakness, or the distress and necessity of the vendor; and this imposes on the purchaser a necessity to remove this violent presumption by the clearest evidence of the fairness of his conduct."³ Mr. Justice Bradley, speaking of these statements of Kerr and Chancellor Desaussure, remarks that, while they were made with reference to private sales and do not strictly apply to judicial sales, yet "they show that great inadequacy of price is a circumstance which a court of equity will always regard with suspicion, unless it appears from the circumstance of the case, or by evidence, that it is no fault of the buyer."⁴ It may, therefore, be safely said that the rule almost universally recognized in this country is that inadequacy of price alone is not sufficient to set aside a sale of real estate made by a master in chancery unless it is so gross as to shock the sense of the court.⁵ The inadequacy must be so great as to raise a presumption of fraud;⁶ that is,

¹ American Ins. Co. v. Oakley, 9 Paige, 259; Barling v. Peters, 134 Ill. 606, 620, 25 N. E. 765.

² Kerr on Fraud (Am. ed.), 186.

³ Butler v. Haskell, 4 Desaus. 651, 697.

⁴ Graffam v. Burgess, 117 U. S. 180, 194, 6 Sup. Ct. R. 686.

⁵ Wilson v. Ford, 190 Ill. 614, 628, 60 N. E. 876; Mahone v. Williams, 39 Ala. 202, 220; Williamson v. Dale, 8

Johns. Ch. 290; Livingston v. Byrne.

11 Johns. 555, 566; American Ins. Co. v. Oakley, 9 Paige, 259; Judge v. Wilkins, 19 Ala. 765, 771; Terry v. Swinford (Ky.), 41 S. W. 558; Parker v. Car Wheel Co., 108 Ala. 140, 18 So. 938; Bach v. May, 163 Ill. 547, 45 N. E. 248; Clark v. Glos, 190 Ill. 556, 573, 54 N. E. 631, 72 Am. St. R. 223.

⁶ Garrett v. Moss, 20 Ill. 549; Comstock v. Purple, 49 Ill. 158; Duncan

the inadequacy must be such as to "shock the conscience of the court."¹ Where inadequacy of price alone is relied upon as a ground of attack upon a judicial sale, the inadequacy must be so great as to shock the conscience and to excite the suspicion of the court. If the inadequacy of price is not of this character, then it will constitute no ground for vacating such sale unless there are "additional circumstances against the fairness of the sale, growing out of fraud, accident, or some trust relation of the parties."²

This is particularly true where under the decree the statutory time for redemption is allowed.³ In many cases, while the inadequacy is not so great as to "raise a presumption of fraud," or "shock the conscience of the court," yet a court of equity is enabled to grant relief by "seizing hold of some irregularity in the mode of sale," or of some circumstance of unfairness, and coupling it with the inadequacy in price. In a recent case the supreme court of Illinois say: "This court has held in a number of cases that, while inadequacy of price alone may not justify a court of chancery in setting aside a judicial sale, yet that equity will seize hold of serious irregularities in the mode of sale, or of any circumstances of unfairness towards the debtor, in order to grant relief in a case where such gross inadequacy is shown to exist. Where property has been sold upon execution, or at a judicial sale, at a grossly in-

v. Sanders, 50 Ill. 475; *Quick v. Collins*, 197 Ill. 891, 893, 64 N. E. 288; *Burling v. Peters*, 184 Ill. 606, 25 N. E. 765; *Connely v. Rue*, 148 Ill. 207, 35 N. E. 824; *Quigley v. Breckenridge*, 180 Ill. 627, 54 N. E. 580.

¹ *Graffam v. Burgess*, 117 U. S. 180, 191, 6 Sup. Ct. R. 686; *Pewabic Min. Co. v. Mason*, 145 U. S. 349, 367, 12 Sup. Ct. R. 887.

² *Fidelity, etc. Co. v. Mobile St. R. Co.*, 54 Fed. 26; *Pewabic Mining Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. R. 887; *Graffam v. Burgess*, 117 U. S. 180, 6 Sup. Ct. R. 686; *Byers v. Surget*, 19 How. (U. S.) 303; *Schroeder v. Young*, 161 U. S. 384, 16 Sup. Ct. R. 512; *Lake Superior Iron Co. v. Brown*, 44 Fed. 539; *West v. Davis*,

4 McLean (U. S.), 241, Fed. Cas. 17,422; *Surget v. Byers, Hempst. (U. S.)* 715, Fed. Cas. 13,629; *Mason v. Bennett*, 52 Fed. 343; *Fidelity Trust, etc. Vault Co. v. Mobile St. R. Co.*, 54 Fed. 26; *Hunt v. Fisher*, 29 Fed. 801; *Stockmeyer v. Tobin*, 139 U. S. 176, 11 Sup. Ct. R. 504; *Central Trust Co. v. Sheffield, etc. Coal, etc. R. Co.*, 60 Fed. 9; *The Ruby*, 38 Fed. 622; *Blackburn v. Selma R. Co.*, 3 Fed. 689; *In re Palmer*, 18 Fed. 870; *Jones v. Degge*, 84 Va. 685, 691, 5 S. E. 799.

³ *Booker v. Anderson*, 35 Ill. 66; *Weld v. Rees*, 48 Ill. 428; *Comstock v. Purple*, 49 Ill. 158; *Jenkins v. Pierce*, 98 Ill. 646; *Connely v. Rue*, 148 Ill. 297, 218, 35 N. E. 824.

adequate price, even slight circumstances, indicating unfairness or fraud, either upon the part of the officer, the purchaser or the party to the record benefited by the sale, will furnish sufficient ground for equitable interposition. Where the inadequacy is gross the purchaser can retain his advantage only by showing that he acquired title by proceedings free from fraud or irregularity."¹

§ 603. **Inadequacy of price — Continued.**— Although gross inadequacy of price, alone, will not be sufficient to avoid a sale under judicial process, yet it will, when combined with irregularity in making the sale, or even slight circumstances indicating unfairness or fraud, furnish sufficient ground for equitable intervention.² In such cases the court will seize on any irregularity as a ground for refusing to confirm the sale and to justify an order setting it aside — any irregularity affecting the process, the conduct of the officer making the sale, the purchaser, or of a party to the record, regarded as sufficient to render it unconscionable that the purchaser should retain the undue advantage obtained by his purchase.³ The conscience of the chancellor, quickened by proof of circumstances indicating that an unfair advantage was sought or taken, will seize upon the gross inadequacy as additional and strong evidence of fraud, and will, by its decree or order, prevent the purchaser from reaping an unconscionable advantage; that is, where there is gross inadequacy, "the court will seize upon anything indicating unfairness" to afford relief.⁴ Thus,

¹ *Miller v. McAlister*, 197 Ill. 72, 78, 79, 64 N. E. 254; *Parker v. Shannon*, 137 Ill. 376, 27 N. E. 525; *Davis v. Chicago Dock Co.*, 129 Ill. 180, 21 N. E. 830; *Hobson v. McCambridge*, 130 Ill. 367, 22 N. E. 823.

² *Hamilton v. Quimby*, 46 Ill. 90; *Comstock v. Purple*, 49 Ill. 158; *Davis v. Chicago Dock Co.*, 129 Ill. 180, 189, 21 N. E. 830; *Smith v. Huntoon*, 134 Ill. 24, 30, 24 N. E. 971, 28 Am. St. R. 646.

³ *Henderson v. Sublett*, 21 Ala. 626, 630; *Weber v. Weitling*, 18 N. J. Eq. 441; *Hodgson v. Farrell*, 15 N. J. Eq. 88; *Taul v. Wright*, 45 Tex. 388; *Davis*

v. Chicago Dock Co., 129 Ill. 180, 188, 21 N. E. 830; 2 *Pomeroy's Eq.* 927.

⁴ *Hamilton v. Quimby*, 46 Ill. 90; *Comstock v. Purple*, 49 Ill. 158; *Kinney v. Knoebel*, 51 Ill. 112; *Berry v. Lovi*, 107 Ill. 612; *Howell v. Baker*, 4 Johns. Ch. 122; *Klopping v. Stellmacher*, 21 N. J. Eq. 328; *American Wine Co. v. Scholer*, 85 Mo. 496; *Johnson v. Crawl*, 55 Tex. 571; *Seaman v. Riggins*, 1 Green's Ch. (N. J. Eq.) 214, 34 Am. Dec. 200; *Bixly v. Mead*, 18 Wend. 611; *Roberts v. Roberts*, 18 Gratt. 639, 70 Am. Dec. 485; *Bod v. Ellis*, 11 Iowa, 97; *Davis v. Chicago Dock Co.*, 129 Ill. 180, 189, 21 N. E. 830.

when land has been sold at a grossly inadequate price, slight circumstances tending to show that the debtor was unfairly or fraudulently induced by the holder of the certificate of sale to neglect or delay making redemption from the sale will be seized upon by a court of equity as ground for affording relief to the debtor.¹ So, also, where lands are sold *en masse* for a grossly inadequate price, equity will interfere to set the sale aside.² So, too, in a case where an officer sold a tract of land to his son-in-law for an inadequate consideration, the sale was set aside.³

The courts, however, in such cases must not forget that it is the policy of the law to maintain the stability of judicial sales, and, for that reason, will not vacate a judicial sale unless the interest of justice demands it. While it is true that at any time before a master's sale has been approved the court will order a resale because of fraud or misconduct on the part of the purchaser, or other person connected therewith, or where it is shown that an interested party has been surprised or led into mistake by the conduct of the officer, purchaser, or other person connected therewith, yet the court will decline so to do on motion of such interested party where the result is brought about by his own negligence. Where there has been no irregularity in the sale, mere inadequacy of price will not justify a court in vacating a sale, and thus depriving the vendee of his purchase, unless the inadequacy is so gross as in itself to amount to evidence of fraud. "While courts should always carefully guard judicial sales against all attempts to depreciate the value of the property sold, or to prevent full and fair competition, due regard must also be had to the policy of the law to give stability to such sales."⁴

¹ Henderson v. Harness, 184 Ill. 520, 533, 56 N. E. 786; Hamilton v. Quimby, 46 Ill. 90; Roseman v. Miller, 84 Ill. 297; Davis v. Chicago Dock Co., 129 Ill. 180, 21 N. E. 830.

² Henderson v. Harness, 184 Ill. 520, 530, 56 N. E. 786; Hamilton v. Quimby, 46 Ill. 90; Phelps v. Conover, 25 Ill. 309; Morris v. Robey, 73 Ill. 462; McHany v. Schenk, 88 Ill. 357; Bradley v. Luce, 99 Ill. 234;

Douthet v. Kettle, 104 Ill. 356; Davis v. Chicago Dock Co., 129 Ill. 180, 21 N. E. 830; Hobson v. McCambridge, 130 Ill. 367, 22 N. E. 823; Smith v. Huntoon, 184 Ill. 24, 24 N. E. 971.

³ Hamilton v. Burch, 28 Ind. 283; Lashley v. Cassell, 23 Ind. 600; Rorer, Jud. Sales, § 1100.

⁴ Barling v. Peters, 184 Ill. 606, 619, 25 N. E. 765; Quigley v. Breckenridge, 180 Ill. 627, 631, 54 N. E. 580;

fraud and avoids the sale at the election of the purchaser.¹ The act itself is fraudulent.² So said Lord Tenterden.³ Thus, injecting a fictitious bid is practicing a falsehood. The party making it says to the officer: "I will give so much." The officer accepts the bid and announces: "I am offered so much — who will advance upon that sum?" The result is the party bidding is deceived into giving more for the property than he would otherwise have had to pay, and, if his bid was the last one preceding the fictitious bid, he is, by the fraud practiced upon him, induced to bid against himself.⁴ It is true that at ordinary auction sales the owner may fix a minimum price, or he may give notice of by-bids and thus escape censure, for in such case, the purchaser having notice, there can be no deception, and consequently no fraud;⁵ and it is also true that, at a judicial sale, the court, to prevent a sacrifice of the property, may, and often does, fix a minimum price. This fact, in such case, is publicly announced by the officer on the day of the sale, so that every proposed bidder understands that, to get the property, he must advance upon the price so fixed.⁶ But if no minimum price is fixed by the court and the property is advertised to be sold "without reserve," the highest bidder has a right to stand upon his right as purchaser, whatever the amount of his bid may be.⁷

In some cases the legality of by-bidding has been recognized, where such bids were made in good faith to prevent a sacrifice of the property,—a "defensive precaution," but not otherwise."⁸ But these exceptions still concede that the by-bidding, where an artifice to mislead the judgment and inflame the zeal of others,— "to screw up and enhance the price," in the

¹ *Veazie v. Williams*, 8 How. (U. S.) 134, 153; *Bexwell v. Christie*, Cowp. 396.

² *Veazie v. Williams*, 8 How. (U. S.) 134, 154.

³ *Wheeler v. Collier*, 1 Moody & Malk. 126. See 1 Story, Eq. Juris., § 293.

⁴ *Veazie v. Williams*, 8 How. (U. S.) 134, 154.

⁵ *Veazie v. Williams*, 8 How. (U. S.) 134, 153; *Howard v. Castle*, 6 D. & E. 642.

⁶ *Pewabic Mining Co. v. Mason*, 145 U. S. 349, 360, 12 Sup. Ct. R. 887.

⁷ *Robinson v. Wall*, 2 Phill. Ch. 372; *Green v. Baverstock*, 14 C. B. (N. S.) 204; *National Bank v. Sprague*, 5 C. E. Green (N. J. Eq.), 159; *Mortimer v. Bell*, L. R. 1 Ch. 10; *Dimmock v. Hallett*, L. R. 2 Ch. 21.

⁸ *Connolly v. Parsons*, 3 Ves. 625, note; *Smith v. Clarke*, 12 Ves. 477; *Steele v. Ellmaker*, 11 Serg. & R. (Pa.) 86; *Flint v. Woodin*, 9 Hare, 618.

language of Sir William Grant,—is fraudulent and renders the sale voidable.¹ In other cases it has been held that the by-bidding is no ground for vacating a sale where the last bid prior to that of the purchaser was a genuine one.² The chancellor of New Jersey, in recognizing this exception to the rule, says: “I am much inclined to adopt, as the result of the authorities, the view taken by Mr. W. W. Story in his treatise on Sales, section 482, that the fact that a puffer having bid at a sale will not avoid the sale if, after the bid of the puffer, there is a bid by a real purchaser before the bid at which the property is knocked down; but that in all cases where the bid next preceding is that of a puffer who is bidding to run up the price without any intention to pay, the sale is void.”³ It would seem that this attempted exception to the rule is not well founded, because it may well be in the case cited that the zeal of both of the last bidders is enhanced by the pretended zeal of the by-bidder, or that the judgment of the last bidder is influenced by his reliance upon that of the “puffer” and thus the fraud accomplish its intended purpose.⁴ *Quære*: Can the purchaser be heard to complain that he was influenced by “puffers” if, as a matter of fact, the price paid does not exceed the actual value of the property?⁵

§ 605. Fraud as a ground for vacating a master's sale — Continued.— While the law is stringent against all fraudulent acts and devices and practices on the part of those interested in enhancing the price at a judicial sale, it is equally so with respect to those interested in depressing the price. Our laws would be justly chargeable with censure of neglecting the interests of vendors, if, while they prohibited them from em-

¹ Veazie v. Williams, 8 How. (U. S.) 134, 155; Smith v. Clarke, 12 Ves. 477, 489.

² Connolly v. Parsons, 8 Ves. 625, note; Veazie v. Williams, 8 How. (U. S.) 134, 155.

³ National Bank v. Sprague, 20 N. J. Eq. 159.

⁴ Woodward v. Miller, 2 Coll. 279; Gilliat v. Gilliat, L. R. 9 Eq. 60.

⁵ Reynolds v. Dechaums, 24 Tex. 174, 76 Am. Dec. 101; Latham v. Morrow, 6 B. Mon. (Ky.) 680; Bromly

v. Alt, 5 Ves. 619, 623, 624; McDowell v. Simms, 6 Ired. Eq. (N. C.) 728; Staines v. Shore, 16 Pa. St. 200, 55 Am. Dec. 492; Moncrieff v. Goldsborough, 4 Har. & M. (Md.) 281, 1 Am. Dec. 407; Nat. F. Ins. Co. v. Loomis, 11 Paige, 431; Holmes v. Holmes, 3 Rich. Eq. 61; Smith v. Clarke, 12 Ves. 477; Twining v. Morrice, 2 Bro. Ch. 326; Connolly v. Parsons, 8 Ves. 625, note; Freeman, Executions, § 298.

ploying puffers at auctions of their estates, they suffered purchasers, by unjust combinations among themselves, to obtain the property at a sacrifice. But the law is not obnoxious to this censure. While, on the one hand, it protects purchasers from the influence of fictitious biddings and false appearances produced by the conduct of puffers, on the other, it will equally protect the rights of the vendor, by illegal combinations and arrangements among bidders to obtain his estate at an under price.¹ The law is settled that the greatest fairness is required of those intrusted by law to conduct sales, and of those who purchase at such sales; and, therefore, any agreement, contract or arrangement entered into, on the part of bidders, calculated to stifle competition at the sale, is contrary to public policy, a fraud upon the law, and vitiates the sale.² It is a well recognized rule, that where a person, desirous of purchasing property at auction, prevents others, by his improper conduct, from bidding against him, and thus succeeds in purchasing the property at less than its fair market value, the sale will be set aside. So, agreements not to bid at a public auction are in general void, as against public policy, and tending to fraud, and such agreements, at least when brought about or participated in by the purchaser, will vitiate the sale.³

At a judicial sale the owner has no choice in the matter, but, on the contrary, his property must be sold for whatever it will bring. All that he may lawfully ask is that the court shall see that due notice of the time and place of sale shall be given, that the property is sold to the highest bidder, to a purchaser whose interest is not adverse to his own, and that there is fair competition among those who desire to purchase. This is his right under the law and this much he may demand of the court. It frequently happens that parties desiring only a portion of the land enter into unlawful agreements not to bid against each other, the purchaser and his co-conspirators agreeing to divide the property afterward to suit themselves, the object, of course, being that each shall get the coveted portion at the least possible price. Sometimes the officer himself becomes a

¹ Wooton v. Hinkle, 20 Mo. 290, 292. galls v. Rowell, 149 Ill. 163, 169, 36 N. E. 1016.

² Wilson v. Kellogg, 77 Ill. 47; In- ³ Ingalls v. Rowell, 149 Ill. 163, 169, 36 N. E. 1016.

party to such unlawful combination.¹ Any and all devices of this character, or, indeed, any other device or scheme by which competition is lessened or altogether avoided, are "highly immoral, and will if possible be thwarted by the courts. When properly brought to the attention of the court by motion, or otherwise, the sale will be vacated and a resale ordered."²

It is well settled by the authorities that any and all such agreements, made for the purpose of reducing competition at a judicial sale, are fraudulent and void, and, if the purchaser at such sale is a party to such an agreement, he can take no benefit under his purchase, and the sale will be set aside by the court.³ Where a purchaser, by setting up claim to land, or by threats, false statements or suggestions, deters others from bidding, and thereby obtains the property at an inadequate price, the sale will be vacated and a resale ordered.⁴ So if a purchaser, having knowledge of a fact which, if known to others, would influence others to bid a greater sum, conceals knowledge of such fact, and then buys the land for an inadequate price, he will not be permitted to retain his unconscionable advantage, but the court will vacate the sale and order a resale.⁵ But to found a claim for relief upon the ground of undue concealment there must be something partaking of the nature of constructive fraud — a non-disclosure of a fact, or facts, which one party is under some legal or equitable obligation to communicate to the other.⁶

¹The utmost good faith, fairness and impartiality are required on the part of the officer. These are indispensable prerequisites to a valid judicial sale. If they are lacking, and the owner, or any other person interested in the land, suffers therefrom, the sale will be vacated. *Dempster v. West*, 69 Ill. 613, 619.

²*Freeman*, *Void Jud. Sales*, § 40.

³*Quigley v. Breckenridge*, 180 Ill. 627, 639, 54 N. E. 580; *Longwith v. Butler*, 3 Gilm. (Ill.) 82; *Coffey v. Coffey*, 16 Ill. 141; *Stoker v. Greenup*, 18 Ill. 27; *Meeker v. Evans*, 25 Ill. 322; *Mapps v. Sharpe*, 32 Ill. 13; *Devine v. Harkness*, 117 Ill. 145, 7 N. E. 52; *Ingalls v. Rowell*, 149 Ill. 163, 36 N. E.

1016; *Jones v. Caswell*, 8 Johns. Cas. 29, 2 Am. Dec. 184; *Hook v. Turner*, 22 Mo. 883; *Martin v. Blight*, 4 J. J. Marsh. 491, 20 Am. Dec. 226; *Greenhood on Public Policy*, 188; *Rorer on Judicial Sales*, § 77; *Bateman on Auctions*, 121.

⁴*Coffey v. Coffey*, 16 Ill. 141; *Vantrees v. Hyatt*, 5 Ind. 487; *Bunts v. Cole*, 7 Blackf. 265, 41 Am. Dec. 226; *Bethel v. Sharp*, 25 Ill. 173, 76 Am. Dec. 790; *Rorer, Jud. Sales*, § 1093.

⁵*Hutchinson v. Moses*, 1 Browne, 187; *Rorer, Jud. Sales*, § 1090.

⁶*Watt v. McGalliard*, 67 Ill. 513, 518; 1 *Story's Eq. Juris.*, §§ 204-207.

§ 606. **Fraud as a ground for vacating a master's sale — Continued.**— It is not every joint bidder or partnership among bidders at a sale under a decree in chancery that is corrupt and fraudulent. Such joint or partnership bidding may be perfectly legitimate.¹ It is only agreements not to compete at the sale that the law condemns.² The motive prompting the conduct of a party may be entirely laudable, yet, if the result is to diminish or stifle competition, it is fraudulent in law and will constitute ground for invalidating the sale. For example, at a public sale of a debtor's property the purchaser, after announcing his bid, said publicly that, if knocked off to him, he would give the property to the debtor's wife, the result of which was that no other bids were made. It was held that, as his conduct destroyed competition to the injury of the selling creditors, the sale should be set aside, the court remarking that, "where a man employs means adapted to an end, he must be presumed to have intended the effect which naturally follows from them; and if the end be wrong, he should be responsible for it."³ So, too, no matter how corrupt the motive may be that prompts a party, if his act results only in an attempt to diminish or stifle competition, it forms no ground for interference on the part of the chancellor. It is the result or effect of the act and not the motive or intent of the actor that counts. As long as the matter amounts only to an intent, or at most an attempt, it cannot be said to have affected the sale in any manner.

A mere effort to stifle competition, which results in nothing

¹ *Holmes v. Holmes*, 8 Rich. Eq. 61.

² *Nat. Bank v. Sprague*, 5 Green. (N. J.) 159; *Phippen v. Stickney*, 8 Met. 384; *Gibbs v. Smith*, 115 Mass. 592; *Devine v. Harkness*, 117 Ill. 145, 7 N. E. 52; *Bradley v. Coolbaugh*, 91 Ill. 152; *Kearney v. Taylor*, 15 How. 520; *Smull v. Jones*, 6 Watts & S. 122, 126; *Hamilton v. Hamilton*, 2 Rich. (S. C.) 379, 383; *Longwith v. Butler*, 3 Gilm. (Ill.) 32; *Meeker v. Evans*, 25 Ill. 322; *Stoker v. Greenup*, 18 Ill. 27; *Mapps v. Sharpe*, 32 Ill. 13; *Thompson v. Davies*, 18 John. 110; *Hook v. Turner*, 23 Mo. 333; *Wicker v. Hoppock*, 6 Wall. 97, 98 and

cases; *James v. R. Co.*, 6 Wall. 752; 9 Del. Ch. 491; *Mason v. Pewabic Min. Co.*, 133 U. S. 50, 10 Sup. Ct. R. 224; *Ex parte Lacey*, 6 Ves. 625; *Lister v. Lister*, 6 Ves. 631; *Hatch v. Hatch*, 9 Ves. 292; *Randall v. Ervington*, 10 Ves. 423; *Ex parte Bennett*, 10 Ves. 381; *Parkes v. White*, 11 Ves. 209, 226; *Michoud v. Girod*, 4 How. 555; *Greenhood*, Pub. Policy, 180-184; *Bateman on Auctions*, 121; *Rorer*, Jud. Sales, § 77; *Story*, Eq. Jur., § 293, and note.

³ *Carson v. Law*, 2 Rich. Eq. 296, 311; *Thompson v. Davies*, 18 John. 112, 114.

more than an attempt, will not be sufficient ground for setting aside a judicial sale. The motive of a party may be ever so corrupt and yet, if he fails to accomplish his purpose, his conduct will not invalidate the sale.¹ Counsel sometimes insist that the true test of illegality of such a contract is not whether any injury actually resulted from the agreement proven in the particular case, but what was the object of the parties who entered into it; in other words, that the validity of agreement is not to be tested by its *results*, but by its objects. But, on examination of the cases cited in support of this contention,² it will be found that actions were brought based on such agreements. Of course, if two parties enter into an agreement to prevent competition at a public sale, no action can be maintained upon it by either, such an agreement being against public policy.³ All such contracts made by purchasers, the object of which is to diminish or stifle competition at public auctions, being against public policy, are void in law, lacking, as they do, one of the essential elements of a valid contract, viz., a legal consideration.⁴

§ 607. Fraud as a ground for vacating a master's sale — Continued.— Any improper conduct on the part of the purchaser, calculated to deter others from bidding and thus depreciate the price, especially if he buys the property at an inadequate price, will be good ground for invalidating the sale. Thus, the purchaser, having made the first bid, and after several rival bids had been made, crossed over the platform and asked a rival bidder why he bid against him. The bidder replied that he thought it was a free sale. The purchaser responded that he ought not to bid against him as he had lost largely by the Potters, and expressed some feeling about it, whereupon the bidder withdrew and the estate was struck off to the purchaser for much less than its value. The court held that the conduct of the purchaser was improper and set the sale aside.⁵

¹ Haynes v. Crutchfield, 7 Ala. 189, 197.

² Gibbs v. Smith, 115 Mass. 592; Thompson v. Davies, 18 Johns. 112.

³ Quigley v. Breckenridge, 180 Ill. 637, 638, 54 N. E. 580; Gibbs v. Smith, 115 Mass. 592; Thompson v. Davies, 18 Johns. 112.

⁴ Wooten v. Hinkle, 20 Mo. 290, 292; Jones v. Caswell, 8 Johns. Cas. 29, 2 Am. Dec. 134; Dootin v. Ward, 6 Johns. 194; Thompson v. Davies, 13 Johns. 112; 1 Story, Eq. Juris., sec. 293.

⁵ Fenner v. Tucker, 6 R. L. 551.

The following case also furnishes us with a good illustration of the application of this principle. Upon the sale by auction of a barge, the bidder addressed the company present, saying that he had a large claim against the late owner, by whom he had been ill used, whereupon no one offered to bid against him; but the auctioneer refusing to knock down the property to a single bidder, a friend of the bidder bid a guinea more, and the first bidder then made a second and higher bid, amounting, however, to only one-fourth of the prime cost of the barge; and the court held that there was no legal sale.¹ The law guards judicial sales with jealous care. Any combination to prevent fair competition is contrary to morality and sound policy. It operates as a fraud upon the debtor, and his creditors, by depriving the former of the opportunity of obtaining a full equivalent for the property devoted to the payment of his debts, and opens the door for oppressive speculation.²

It is impossible to enumerate all of the various devices resorted to to reduce or prevent completion at judicial sales. False statements may be made concerning the title or value of the property, the time of the sale, the validity of the proceedings, or the purposes in view of which a bid is made. "Thus a bidder may cause the bystanders to believe that he is acting through motives of philanthropy toward the defendant or his family, and may thus prompt them to refuse to participate in the biddings. The mode by which competition is presented is immaterial. The guilty party will not be allowed to retain the benefits of his chicanery. The sale will be vacated on proper proceedings instituted for that purpose."³ While the law will not tolerate any fraudulent acts or devices calculated to enhance or depress the purchase price, yet care must be taken to distinguish between such acts and lawful competition.

All that the law demands is good faith — fairness. Those interested in selling are not required to abstain from doing any legitimate act to enhance the price, and those seeking to buy may resort to all honorable means to buy as cheaply as possible. In every public sale, as there are but two leading

¹ Fuller v. Abrahams, 6 J. B. Moore, 315, 3 Brod. & B. 116.

² Jones v. Caswell, 3 Johns. Cas. 29,

² Am. Dec. 134; Troup v. Wood, 4 Johns. Ch. 228, 254.

³ Freeman on Executions, sec. 297, and cases cited.

interests, so there are but two parties: those engaged in vending, and those proposing to purchase. These are necessarily antagonists, because their interests are directly contrary the one to the other. This is so well understood by all practical men that all their expectations have reference to it, and no man of the least experience or penetration is surprised when he sees these opposing interests in full play at every public auction. It is the interest and well understood intention of the vending party to sell as high, and of the purchasing party to buy as low, as possible. Neither expects, nor has a right to expect, that his opponent shall make any provision to advance his interests, or forego any *bona fide* arrangement calculated to promote his own interests, for the sake of enhancing his antagonist's, nor in any way to sacrifice any right which he has, in favor of an opposing right, which is neither more just nor more sacred in the eye of the law than his own. It is the function of public policy to secure each of these classes, and not one at the expense of the other. It simply requires that each, in the promotion of his own interests, and in the exercise of his own rights, shall act fairly. A fair competition will be allowed for the benefit of the vendors. No trick, no circumvention, will be allowed to prevent it. On the other hand, the bidder will be protected against all imposition. All this public policy requires, but no more. The sum and substance of the whole matter is this: each party will be indulged in every means adopted *bona fide* for the promotion of his own interests; but he shall resort to no trick for that purpose.¹

§ 608. Accident — Surprise — Mistake.— An accident, mistake or misapprehension may be as fatal to the rights of a party interested in a judicial sale as a positive fraud, deliberately planned and executed for that express purpose. Hence courts of equity, in enumerating the grounds upon which they will set a sale aside and order a resale, are careful to include "accident, surprise, mistake and misapprehension" as amply sufficient to justify the court in the exercise of its discretion in that regard. Any mistake or misunderstanding between the persons conducting the sale and intended bidders or parties in interest, and any accident, fraud or other circumstance by

¹ Carson v. Law, 2 Rich. Eq. 296, 307, 308.

which interests are prejudiced, without the fault of the injured party or parties, will be deemed sufficient cause for refusing confirmation and ordering a resale.¹ Especially is it true that, where gross inadequacy of price is coupled with accidents, mistakes or misapprehensions caused by a purchaser or others interested in a judicial sale, or by the officer's conduct, the court will set aside the sale.² A court of equity will never permit one to profit by a mistake or misapprehension of another, when unaccompanied by fault or negligence on the part of the latter, and this is true although the party who caused the mistake or misapprehension may have been wholly free from any intentional wrong. The court will not, therefore, where property is sold under its process for a wholly inadequate price, permit one who, however innocently and unintentionally, contributes to the mistake of the owner, by which he is misled as to the time of sale, to take advantage of the mistake by a voluntary purchase of the property at the sale.³ A court of equity will set aside a sale, even if there has been no fraud, when there is a gross inadequacy of price, and the parties, by reason of mistake or misapprehension, did not attend the sale, and the sacrifice was caused by such mistake or misapprehension.⁴ Where the owner of the property and therefore defendant in a foreclosure proceeding was, without fault on his part, prevented, through a concurrence of accidental causes, from being represented at the sale, and the property was sold for about one-third of its value, the court held that the case came within the well established and benign principles under which courts of equity grant relief against sales made under their decrees.⁵ In one case a party interested in the property attended on the day of sale, but was told by the complainant that, owing to a mistake in the advertisement, the sale would not take place, but would be re-advertised. The complainant then promised to notify him of the day of sale, but, forgetting so to do, the sale took place in his absence, and the

¹ *Hileary v. Thompson*, 11 W. Va. 118, 117; *Cole County v. Madden*, 91 Mo. 585, 614, 4 S. W. 397.

² *Hardware Co. v. Building Co.*, 182 Mo. 442, 444, 84 S. W. 57, 81 L. R. A. 335, 53 Am. St. 494, and cases cited.

³ *Wetzler v. Schaumann*, 24 N. J. Eq. 60, 64.

⁴ *Kloeping v. Stellmacher*, 21 N. J. Eq. 328, 330.

⁵ *Hoppock v. Conklin*, 4 Sandf. Ch. 582, 586.

property was sold for a grossly inadequate sum. While the complainant was not guilty of any intentional wrong, yet, as his "forgetfulness" misled the party to his injury, the court set the sale aside and ordered a resale of the property.¹

§ 609. Accident — Surprise — Mistake — Continued.— The following illustrations are given of cases in which it was held that accident, surprise or mistake constituted sufficient ground to justify the court in setting aside the sales and ordering a resale. Thus, misapprehension of a party caused by misrepresentation of *complainant*,² his *agent*,³ or his *solicitor*;⁴ mistake of officer in not following directions of complainant's solicitor in making the sale;⁵ where all parties acted under the mistaken belief that the property was being sold subject to a mortgage, when in fact it was sold to satisfy the mortgage debt, the purchaser paying only \$400 when he thought he was paying \$2,400;⁶ misapprehension as to postponement of sale created by language and conduct of master;⁷ mistake as to *time* of sale;⁸ mistake as to *place* of sale caused by innocent misstatement of complainant's solicitor;⁹ misapprehension as to the *quantity* of land being sold;¹⁰ mistake of party by taking wrong road and, by so doing, arriving at place of sale too late;¹¹ or sudden illness of the defendant owner, preventing him from raising the money to satisfy the decree, and also from attending the sale.¹²

In all such cases when it appears to the court that it would be inequitable or against good conscience to permit the sale to stand, the court will not hesitate to exercise its discretion

¹ Pell v. Vreeland, 35 N. J. Eq. 22.

² Pell v. Vreeland, 35 N. J. Eq. 22; Strong v. Catton, 1 Wis. 471.

³ Howell v. Hester, 4 N. J. Eq. 266.

⁴ Seaman v. Riggins, 2 N. J. Eq. 214, 34 Am. Dec. 200; Williamson v. Dale, 3 Johns. Ch. 290.

⁵ Requa v. Rea, 2 Paige, 339.

⁶ Stroup v. Raymond, 183 Pa. St. 279, 38 Atl. 626, 63 Am. St. 758.

⁷ Collier v. Whipple, 13 Wend. 224.

⁸ Williamson v. Dale, 3 Johns. Ch. 290; Howell v. Hester, 4 N. J. Eq. 266.

⁹ Seaman v. Riggins, 2 N. J. Eq. 214, 34 Am. Dec. 200.

¹⁰ Anderson v. Foulke, 2 Har. & G. 346; Veeder v. Fonda, 3 Paige, 94, 98; Laight v. Pell, 1 Edw. Ch. 577.

¹¹ Seaman v. Riggins, 2 N. J. Eq. 214, 34 Am. Dec. 200.

¹² Billington v. Forbes, 10 Paige, 487. For many other cases of like kind, where relief has been granted on the ground of accident, surprise or misapprehension, see Freeman on Executions (8d ed.), § 304*h*, and cases cited. See also Rorer, Jud. Sales, §§ 566, 567.

by ordering a resale;¹ but the right of a court of equity to grant the relief desired in such cases depends upon certain conditions which may be stated as follows:

First. The accident, mistake or misapprehension relied upon must be a reasonable one; that is, it must be such an one as would have produced the same result with any man of ordinary prudence and judgment.

The misapprehension relied upon must not be a mere delusion or misconception based upon no sufficient ground or cause. While the law jealously protects innocent parties against mistakes, yet, to justify interference on the part of the court, it must be made to appear that the alleged mistake is not only a material but a genuine one.²

Second. The complaining party must have exercised reasonable diligence under the circumstances; in other words, if the injury relied upon could have been avoided by the exercise of ordinary care and diligence, relief should be denied.

The same rule obtains here as in ordinary cases where a court of equity is called upon to correct mistakes made in contracts between private individuals. Equity does not grant relief to a party on the ground of accident or mistake, if the accident or mistake has arisen from his own gross negligence or want of reasonable care, especially if relief to him will harm another.³ That is, it is not in every case of mistake, even of a material fact, that a court of equity will grant relief, for, if the mistake is the result of the party's carelessness or inattention, the court will not interfere in his behalf, its policy being to administer relief to the vigilant and to put all parties upon the exercise of a reasonable degree of diligence.⁴ In such cases the maxim *Vigilantibus non dormientibus jura subveniunt* is applied.⁵

Third. The accident, mistake or misapprehension relied upon must have been as to a material matter.⁶

Fourth. The act complained of must have injuriously affected the complaining party.

¹ Strong v. Catton, 1 Wis. 471, 494.

² Fiske v. Weigel, 21 Atl. 452, 458.

³ Upham v. Hamill, 11 R. L. 565, 566, 23 Am. Rep. 525; Penny v. Martin, 4 Johns. Ch. 566; Capehart v. Mhoon, 5 Jones' Eq. 178.

⁴ Wood v. Patterson, 4 Md. Ch. 835, 839.

⁵ Taylor v. Fleet, 4 Barb. (N. Y.) 95, 103; Brown v. Fagan, 71 Me. 563, 568.

⁶ See cases cited in the two last notes.

Fifth. The ground relied upon to justify the court in ordering a resale must not have been waived by the complaining party.¹

It is not necessary that the person responsible for the mistake or misapprehension should intentionally commit the act that led to it, but it is sufficient if the result of the act, however innocent the intent may have been, was a surprise or misapprehension causing the injury.² For example, in a New York case, where a party was misled to his injury by the language and conduct of the master, the court held that it was not necessary that the master designedly misled the parties interested in the sale, it being sufficient if that was the natural tendency and effect of his conduct, and that, owing to the great power possessed by masters in making sales, such power should be executed in a frank and undisguised manner. The court add: "It cannot be tolerated that a master shall, in answer to inquiries, express doubts as to whether a sale will take place, and that down to the very moment of sale, and then silently attend and sacrifice the property."³

The proper method of presenting the question to the court, in such cases, is a summary proceeding by motion, in the same case in which the order of sale was made, which motion should be supported by affidavits.⁴

§ 610. Scarcity of bidders.—As a rule scarcity of bidders alone constitutes no ground for vacating a judicial sale; that is to say, if the sale has been regularly and properly advertised and the property sold in accordance with the terms of the decree, the mere fact that only one or two bidders are present will not, for that reason alone, justify the court in setting aside the sale and thus deprive the purchaser of his bargain.⁵

Mr. Justice Staples, speaking for the court in a Virginia

¹ As to waiver of the right to object to the validity of a judicial sale, see *post*, § 611 *et seq.*

² *Wetzler v. Schaumann*, 24 N. J. Eq. 60, 64; *Seaman v. Riggins*, 2 N. J. Eq. 214, 34 Am. Dec. 200; *Wetzler v. Vreeland*, 24 N. J. Eq. 60, 64; *Pell v. Vreeland*, 35 N. J. Eq. 22.

³ *Collier v. Whipple*, 18 Wend. 224, 229.

⁴ *Brown v. Frost*, 3 Paige, 344; and see generally cases cited in foot-notes to this section; also *ante*, § 591 *et seq.*

⁵ *Learned v. Gear*, 139 Mass. 31, 29 N. E. 215; *Hudgins v. Lanier*, 28 Gratt. (Va.) 494; *Power v. Larabee*, 3 N. D. 502; *Equitable Trust Co. v. Shrope*, 73 Iowa, 296, 34 N. W. 867; *Swires v. Brotherline*, 41 Pa. St. 135, 80 Am. Dec. 601.

case, says: "It is no just cause for vacating a judicial sale that only a few bidders were present. The competition may be as active and spirited among two or three as a dozen. The only inquiry for the court is whether the terms of the decree have been pursued and the property sold at an adequate price."¹

In a North Dakota case, where the creditor was the purchaser and only bidder, the court say: "It is not necessary that there should be more than one bidder to make a sale at public auction. It is sufficient if the public have been fully advised of the sale by legal publication of notice, and have the right to attend and bid. Those who do not attend the sale assert by their conduct that they do not wish the property at any price. Must the plaintiff's right to collect his judgment be forever stayed because he alone is willing to buy the property? We have no doubt on this point on principle, and we are able to cite eminent authority to support our view that the absence of all other bidders did not of itself render the sale either void or voidable."²

There are four reasons influencing the court in the application of the above rule:

First. A due consideration of the rights of the bidder.

While it is true, as shown in a previous section, that a bid is but an offer to buy at the price named, and that the bidder only becomes a purchaser upon confirmation by the court, yet it is also true that the court has no right to arbitrarily withhold such confirmation. Where property is ordered to be sold at auction to the highest bidder, and is duly advertised and "knocked off" to a single bidder, it is "sold to the highest bidder." The fact that he is the only one does not, and should not, deprive him of this right. As well said by a Pennsylvania judge, "Assuredly the only bidder is not to be accounted guilty of a fraud because others were not venturous enough to outbid him."³

Second. To order a resale is but an experiment, with the chances against the result being any more satisfactory than the first.

¹ *Hudgins v. Lanier*, 28 Gratt. (Va.) 31, 29 N. E. 215, and *Freeman on Executions*, § 308, pp. 1046, 1047.

² *Power v. Larabee*, 3 N. D. 502, ³ *Swires v. Brotherline*, 41 Pa. St. 510, citing *Learned v. Geer*, 189 Mass. 185, 140, 80 Am. Dec. 601.

The probability is that all who desired the property attended the first sale, and those who stayed away did so because they did not want the property at any price.¹ If this be true, why readvertise the property with but a hope that they may change their minds and attend a second sale as bidders?

Third. The policy of the courts is to maintain the stability of judicial sales.

If the probability of a bidder's offer being accepted by the court depends upon the number of competing bidders, or, in other words, if to determine the chances of confirmation he must count his competitors, few men will care to hazard an offer.

Fourth. Real estate is usually sold at judicial sales subject to the right of redemption, and, of course, the owner may fully protect himself by availing himself of this right,—the less the property sold for, the easier will it be for him to redeem.²

In such cases a party, instead of troubling the court with an application for a vacation of the sale, should, if there is really any margin between the market value and the price paid, protect himself by redeeming. Where property is sold subject to redemption, it is not expected that there will be competition at the sale, nor can it be said that it is important to the debtor there should be. If the property is sold too low, he can make his own resale publicly or privately, and to do so he does not need another sale under the order of the court.³ Yet, under certain circumstances, a scarcity of bidders at a judicial sale will be good cause for its vacation and ordering a resale. It is the right of every party concerned in interest in the property to be sold at public auction to have it offered for sale under such circumstances as will afford an opportunity for fair competition amongst all who may be disposed to buy. Many sales are vacated and resales ordered on the ground that, under the circumstances, fair competition was prevented, to the prejudice of those interested.⁴

In such cases "scarcity of bidders," in connection with the circumstances which probably produced this result, will justify

¹ *Power v. Larabee*, 3 N. Dak. 502, 510.

² See *ante*, § 598.

³ *Equitable Trust Co. v. Shrope*, 73 Iowa, 297, 34 N. W. 867.

⁴ *Roberts v. Roberts*, 13 Gratt. (Va.) 639, 641.

a vacation of the sale. The following may be mentioned as examples of such cases. Thus:

(a) Bidders may be induced to stay away on account of the inclemency of the weather.

The master, or other officer, can only advertise a sale to take place on a certain day, trusting that, when it arrives, the weather will be such as to afford bidders a fair opportunity to attend, and if, when the day arrives, the weather proves to be so inclement as to prevent a fair attendance of bidders, he should adjourn the sale to another day; and if, in violation of this duty, he proceeds with the sale and sells the property to a single bidder for an inadequate price, the court may correct the error by setting the sale aside and ordering a resale.¹

(b) Making the sale at an unusual hour and thus preventing the probable attendance of bidders may be good cause for vacating the sale.²

(c) Making the sale during the prevalence of a pestilence or infectious disease, for an inadequate price, there being a "scarcity of bidders," will constitute good ground for its vacation and an order for a resale.

In an Alabama case the sale was made in the city of Mobile during a time when the yellow fever was raging in the city, and when the alarm created by the pestilence had driven from the city a large portion of its population, and suspended its business and commerce to a great extent. This was held to be ample reason for setting the sale aside, the property having been sold for an inadequate price. The court, among other things, said: "It is impossible to suppose that, under such circumstances, property exposed to sale could bring anything like its fair value, not alone by withdrawing competition, but also because the presence of the destroying pestilence would indispose the minds of most men to make investments of any kind, and it was doubtless owing to these causes that the property in question did not bring one-fifteenth of its value."³

(d) Making the sale in time of war and on a day of a threatened invasion of the enemy, for an inadequate price, would constitute good ground for its vacation.

¹ Johnson v. Crawl, 55 Tex. 571;
Roberts v. Roberts, 18 Gratt. (Va.)
639; Howell v. Baker, 4 Johns. Ch.
118; Pritchard v. Askew, 80 N. C. 86.

² Johnson v. Crawl, 55 Tex. 571.

³ Littell v. Zuntz, 2 Ala. 256, 262,
36 Am. Dec. 415. See ante, § 570.

Under such circumstances it would be the duty of the master, or other officer making the sale, to adjourn it to another day more favorable to the attendance of bidders,¹ and if he should fail so to do, but proceed to sell for an inadequate price, the court should set the sale aside.

(e) So, too, if the sale takes place on election day, or any holiday when bidders would probably be deterred from attending, and for an inadequate price, it will, on application, constitute good cause for its vacation by the court.²

In all the foregoing instances it is unfair to those interested in the property to proceed with the sale, and the purchaser at such sale becomes so far a participant in the wrong that he is in no condition to object to the relief applied for, nor is he in position to deserve consideration at the hands of the court.³

VIII. WAIVER OF GROUNDS OF OBJECTION.

§ 611. **Waiver of right to object on ground of irregularities or otherwise.**—The doctrine of waiver of the right to object has been touched upon more than once in the preceding pages, but its importance and its frequent occurrence require a more extended examination of the subject. Although there may be such irregularities in the master's sale as would require the court to set it aside upon the application of the party aggrieved, yet it may, by ratification, either express or implied, be rendered valid and binding.⁴

The various ways in which a party may waive his right to object on the ground of irregularities in a judicial sale may be classified as follows:

First. The right to object may be expressly waived by the party having the right to insist upon it.

Second. The right to object may be waived by implication by some affirmative act of the party.

Third. The right of objection may be waived by a failure to adopt the proper remedy to obtain relief.

Fourth. The right to object may be waived by laches; that is, may be barred by mere lapse of time.

¹ See *ante*, §§ 578, 579.

² *King v. Platt*, 87 N. Y. 155.

³ *Johnson v. Crawl*, 55 Tex. 571, 574.

⁴ *Michoud v. Girod*, 4 How. (U. S.)

409, 420, 45 Am. Dec. 310; *Tooley v.*

Gridley, 11 Miss. 493, 515, 41 Am. Dec.

628; *Henderson v. Herrod*, 23 Miss.

434, 453.

503, 561; *Scott v. Freeland*, 15 Miss.

Some suggestions will be here offered upon each of the foregoing methods, and

First. As to an express waiver.

This may be done either by a stipulation to that effect, or by appearing in open court and consenting to the confirmation of the master's report of sale. Of course it is superfluous to add that, after so waiving a party's right of objection, he is forever thereafter estopped from complaining.¹

Second. Waiver of right of objection by affirmative act or acts of party.

Perhaps the best illustration of this method of waiving the right of a party to question the validity of a judicial sale is that of receiving the surplus proceeds of the sale, with full knowledge of his rights. Indeed this doctrine of estoppel is carried so far that even void judicial sales may be so ratified. Freeman says that there can now be no doubt that void judicial sales may be ratified, and that they may be ratified directly or by a course of conduct which estops the party from denying their validity.² Thus if the defendant in execution, after a void sale of his property has been made, claims and receives the surplus proceeds of the sale, with a full knowledge of his rights, his act must thereafter be treated as an irrevocable confirmation of the sale.³ The receipt of his share of the purchase money is an affirmation that the title of the owner has passed to the purchaser by the sale; and he will not afterward be permitted to make a contrary allegation, to the injury of those who paid their money on the faith of the conveyance. A party will never be permitted to receive the money and at the same time insist upon retaining his title to the land. The application of this principle does not depend upon any supposed distinction between a void and voidable sale. The receipt of the money, with the knowledge that the purchaser is paying with the understanding that he is purchasing a good title,

¹ *Jouet v. Mortimer*, 29 La. Ann. 206; *Crawford v. Ginn*, 35 Iowa, 548.

² *Maple v. Kussart*, 53 Pa. St. 348, 91 Am. Dec. 214; *Johnson v. Fritz*, 44 Pa. St. 449; *Deford v. Mercer*, 24 Iowa, 118, 92 Am. Dec. 460; *Pursley v. Hays*, 17 Iowa, 310; *Johnson v. Cooper*, 56 Miss. 608.

³ *Freeman on Executions*, sec. 351a, citing *Stroble v. Smith*, 8 Watta. 280; *McLeod v. Johnson*, 28 Miss. 374; *Southard v. Perry*, 21 Iowa, 488, 89 Am. Dec. 587; *Huffman v. Gaines*, 47 Ark. 226; *State v. Stanley*, 14 Ind. 409; *Crowell v. McConkey*, 3 Pa. St. 168, and other cases.

touches the conscience, and therefore binds the party in one case as well as the other.¹ Wherever a party, capable of entering into a valid, binding contract, accepts his portion of the price of land sold at a judicial sale, with full knowledge of his rights, he will thereafter be held estopped from attacking the validity of such sale, such act being treated by the court as an irrevocable ratification however erroneous the proceedings may have been.² He cannot retain the purchase price and assert his claim to the real estate.³ If a party's idea of honesty is to pocket the proceeds of the sale and then use the money in attempting to recover the realty, "the law will correct his principles of morality."⁴ It seems that to justify the application of this doctrine of equitable estoppel it is not necessary that the purchase price be paid direct to the party in interest. If the proceeds were paid out on his indebtedness, with his knowledge, and without protest or objection on his part, he will be estopped from attacking the sale.⁵

§ 612. Waiver of right to object on ground of irregularity or otherwise — Continued.— Where an act of a party is relied upon as a ratification it must be shown that the act relied upon as such was done with full knowledge of the right of the party and of the consequences of the act.⁶ This rule applies to all judicial sales. If lands are sold for the purpose of partition all parties in interest, who receive their share of the proceeds, with knowledge of their rights, will not be afterward permitted to deny the validity of the partition sale. If

¹ *Smith v. Warden*, 19 Pa. St. 424, 430.

² *Wilkins v. Anderson*, 11 Pa. St. 399; *Stroble v. Smith*, 8 Watts, 280; *Commonwealth v. Shuman's Adm'r*, 18 Pa. St. 343; *Smith v. Warden*, 19 Pa. St. 424.

³ *Byars v. Spencer*, 101 U. S. 429, 436, 40 Am. R. 212; *Commonwealth v. Shuman's Adm'r*, 18 Pa. St. (6 Harris), 343; 2 *Smith's Lead. Cases* (5th Am. ed.), 662.

⁴ *Wilson v. Bigger*, 7 W. & S. (Pa.) 111, 126.

⁵ *Bright v. Boyd*, 1 Story, C. C. 478, 498, Fed. Cas. 1,875; *Penn v. Heisey*,

19 Ill. 295, 299; *Spragg v. Shriver*, 25 Pa. St. 281, 64 Am. Dec. 698; *Mitchell v. Freedley*, 10 Pa. St. 208; *Maple v. Kussart*, 53 Pa. St. 352, 91 Am. Dec. 214; *Williard v. Williard*, 56 Pa. St. 128; *Freeman*, Void Jud. Sales, § 50.

⁶ *Davidson v. Young*, 38 Ill. 145, 158; *Schnell v. City of Chicago*, 38 Ill. 382, 87 Am. Dec. 304; *Dorlarque v. Cress*, 71 Ill. 380; *Tucker v. Moreland*, 10 Pet. 58; *Jackson v. Carpenter*, 11 Johns. 539; *Jackson v. Burchin*, 14 Johns. 124; *Boody v. McKenney*, 23 Me. 517; *Doe v. Abernathy*, 7 Blackf. (Ind.) 442.

they claim the money they must let go of the land.¹ So, too, in a case of a foreclosure sale, if the mortgagor, with a full knowledge of the facts which render the sale void or voidable, receives the purchase price, it constitutes a ratification and forever afterward prevents him from complaining. It seems that there is no question but that the rule applies to a ward or an heir who receives his distributive share of real estate sold by a guardian or an administrator.² However this may be, there is, and can be, no question as to the application of this rule in a case where, at the time of the receipt of the proceeds of the sale, the heir or ward has become of full age,³ with knowledge. Such parties are then under no disability and are by said act estopped from claiming any title to the land.⁴ The same result is produced by the receipt of a balance by a ward after attaining his majority, the remainder having been paid out for his use and benefit during his minority.⁵ But the ward or heir is not estopped where the money was paid out when he was too young to know or understand the nature of the transaction or what his rights were;⁶ but whether this doctrine of equitable estoppel applies to minors who stand by and make no objection while transfers and improvements of their property are going on, having a reasonable discretion, from their age, to understand, is not so clear.⁷ Some courts have held that, under such circumstances, the heir is not estopped on attaining his majority from repudiating the whole transaction by claiming his interest in the real estate.⁸

Judge Story, while carefully refraining from the expression

¹ Tooley v. Gridley, 8 S. & M. 498, 51 Am. Dec. 628; Merritt v. Horne, 5 Ohio St. 307, 67 Am. Dec. 298.

² Jennings v. Kee, 5 Ind. 257; Lee v. Gardiner, 26 Miss. 521, 548; Pursley v. Hays, 17 Iowa, 310; Deford v. Mercer, 24 Iowa, 118, 122, 92 Am. Dec. 460; Wilson v. Bigger, 7 W. & S. (Pa.) 111, 125; Handy v. Noonan, 51 Miss. 166, 169; Parmele v. McGinty, 52 Miss. 475, 484; Walker v. Mulvean, 76 Ill. 18; Corwin v. Shoup, 76 Ill. 246; Byars v. Spencer, 101 Ill. 429, 436, 40 Am. R. 212.

³ Walker v. Mulvean, 76 Ill. 18.

⁴ Id.; Davidson v. Young, 88 Ill. 147.

⁵ Corwin v. Shoup, 76 Ill. 246.

⁶ Schnell v. City of Chicago, 38 Ill. 382, 87 Am. Dec. 304.

⁷ Bright v. Boyd, 1 Story, C. C. 498; Penn v. Heisey, 19 Ill. 295, 300.

⁸ Requa v. Holmes, 26 N. Y. 308; Wilkinson v. Filby, 24 Wis. 441, 444; Longworth v. Goforth, Wright (Ohio), 192. See also Freeman, Void Jud. Sales, § 50.

of an opinion on this subject, says: "There are certainly cases in which infants themselves will be held responsible in courts of equity for their fraudulent concealments and misrepresentations, whereby other innocent persons are injured."¹ In an Illinois case, where a guardian made a sale of the real estate of his ward but failed to secure a confirmation by the court, and who used the proceeds of the sale in the nurture and education of the ward, who was old enough to understand and appreciate her rights, on her attempt to assert title to the property the court say: "We take it that a minor may, and ought to, be bound by his silence, if of age sufficient to know his position with regard to his property. He has no more right to commit a fraud than an adult. This principle of equitable estoppels of this character applies to infants as well as adults; to insolvent sureties and guardians, as well as persons acting for themselves; and they have place, as well, when the proceeds arise from a sale made by authority of law, as when they spring from the act of the party."² But in another case the court held that, as it did not appear that the money received by them was paid to them in lieu of their interests in their real estate, the rule of estoppel did not apply;³ and, in still another case, the same court held the rule had no application because, from the ignorance and non-age of the infants, they did not, and could not, from their position, know anything of the proceedings.⁴ To justify the application of equitable estoppel in case of minors the case must be such that to do otherwise would be to allow them to perpetrate a gross fraud. It is only in the strongest and clearest cases that the doctrine of estoppel will be invoked against an infant. There must be actual fraud to preclude an infant from asserting his rights.⁵ But one thing is certain; that is, if a minor has received the purchase price, and has not wasted or squandered it, he must, in order to have any standing in a court of equity, offer to return it, if in his power. If he has

¹ *Bright v. Boyd*, 1 Story C. C. 478, 493. See 1 Story, Eq. Jur., § 385; 1 Fonbl. Eq. Jur., B. 1, ch. 3, § 4; *Savage v. Foster*, 9 Mod. 35, 37.

² *Penn v. Heisey*, 19 Ill. 295, 300, 68 Am. Dec. 597; *Smith v. Warden*, 19 Pa. St. 424, 430, and cases cited.

³ *Dorlarque v. Cross*, 71 Ill. 380.

⁴ *Schnell v. City of Chicago*, 38 Ill. 382, 87 Am. Dec. 304. See also *Davidson v. Young*, 38 Ill. 145.

⁵ *Kastner v. Pibilinski*, 96 Ind. 229, 231, and many cases cited in the opinion.

wasted or squandered it, this is not required; but if the money is where it can be controlled by the court, it cannot be retained by the party seeking to disaffirm the sale.¹

§ 613. Waiver of right to object on ground of irregularities or otherwise — Continued.— *Third.* Right of attack waived by failure to pursue proper remedy.

In the examination of the subject of attacking judicial sales by motion, in a previous part of this chapter, the rule is stated and fully supported by citation of authorities, that in all cases where the ground of attack is a mere irregularity, this course is absolutely necessary, and that a failure of a party to avail himself of this remedy constitutes a waiver of the right of objection.² There are only two exceptions to this rule, one being where the party was in ignorance of the ground of attack, and could not, by the exercise of reasonable diligence, have discovered the ground of objection in time to avail himself of the summary remedy, and the other where the act complained of was not only an irregularity, but also was fraudulently committed for the purpose of injuring such party, and that injury actually resulted therefrom. In either of these cases a party, notwithstanding his failure to seek relief by the summary method, has his remedy in equity. A court of equity will not tolerate wilful ignorance as an excuse for failure to make an application sooner for relief; therefore, where a party fails to exercise ordinary diligence to ascertain his grounds of objection, if there be any, his ignorance is equivalent to full knowledge and constitutes no excuse for his laches. Even when a party relies upon an irregularity fraudulently committed for the purpose of his injury, he must not be guilty of negligence in the discovery of his ground of objection, and also must be diligent in his application for relief. For example, it has been held that it is only on the ground of fraud and where injury has resulted therefrom, by a sale of lands *en masse*, that the sale will be set aside in equity because the property was not sold in parcels.³ But to justify relief upon such ground a party

¹ Brandon v. Brown, 106 Ill. 519, Knoebel, 51 Ill. 112; Penn v. Heisey, 527, citing Chambers v. Jones, 72 Ill. 19 Ill. 295.

275; Padfield v. Pierce, 72 Ill. 500; ² *Ante*, §§ 591-594.

Walker v. Mulvean, 76 Ill. 18; Wick- ³ Ross v. Mead, 5 Gilm. (Ill.) 171; iser v. Cook, 85 Ill. 68; Smith v. Gillespie v. Smith, 29 Ill. 473, 81 Am. Knoebel, 82 Ill. 392; Kinney v. Dec. 328; Fergus v. Woodworth, 44

must not be guilty of laches in making his application for relief.¹

Where application is made in apt time the sale may be avoided while the title remains in the purchaser at the sale, or in his grantee with notice; but, after the property has passed into the hands of subsequent *bona fide* purchasers for value, without notice of the irregularity in the sale, the right of avoidance of the sale cannot be exercised.² A party seeking to set aside a sale, after confirmation by the court, must satisfy the court that the fraud, or other ground relied upon, was unknown to him at the time of confirmation. Under such circumstances he will be held to have waived the irregularity.³ A party who waits until the period of redemption has expired and until the purchaser has obtained his deed has no right to come into a court of equity and ask that the sale be vacated, unless he can show to the court a good and valid reason for not acting sooner. Under such circumstances he has slept too long upon his rights, if he had any, to invoke the aid of a court of equity. Equity will only lend its aid to those who seek it in apt time.⁴ In such a case it requires a strong showing of fraud, wrong or oppression to justify the intervention of the court. Irregularities may be waived by a failure to act promptly.⁵

§ 614. Waiver of right of objection — Recapitulation.— At the risk of repetition the matter under the foregoing heading may be recapitulated as follows: The time to attack a master's sale, upon the ground of irregularities in the proceedings known to the party objecting, or with which the law charges him with knowledge, or which he might have known

Ill. 374; Hay v. Baugh, 77 Ill. 500; Fairman v. Peck, 87 Ill. 156, 162; Clark v. Glos, 180 Ill. 566, 54 N. E. 630, 72 Am. St. 223.

¹ Prather v. Hill, 36 Ill. 402, 405; Williams v. Rhodes, 81 Ill. 571, 574; McHany v. Schenk, 88 Ill. 357, 365; Wood, Bacon & Co. v. Young, 38 Iowa, 102, 108.

² Cassell v. Ross, 83 Ill. 244, 85 Am. Dec. 270; Mixer v. Sibley, 53 Ill. 61; Conover v. Musgrave, 68 Ill. 58; Wilson v. Park Com'rs, 70 Ill. 46; Gun-

nell v. Cockerill, 79 Ill. 79; Fairman v. Peck, 87 Ill. 156, 163.

³ Rorer, Jud. Sales, § 550.

⁴ Dobbins v. Wilson, 107 Ill. 17, 24. See *ante*, § 598.

⁵ Clark v. Glos, 180 Ill. 566, 574, 54 N. E. 630, 72 Am. St. R. 223; Prather v. Hill, 36 Ill. 402; Jackson v. Spink, 59 Ill. 404; Morgan v. Evans, 72 Ill. 586, 22 Am. R. 154; Hay v. Baugh, 77 Ill. 500; McHany v. Schenk, 88 Ill. 357.

by the exercise of reasonable diligence, is on the coming in of the master's report. As the confirmation, especially after the case is finally disposed of, waives all mere irregularities, "the motion to vacate ought to be made in answer to the application for the confirmation of the sale."¹ After the confirmation order has been entered, all objections on the ground of mere irregularities will be considered as passed upon by the court and held not to be sufficiently established, or, if shown, that they were held not to be sufficient to justify the court in withholding its confirmation. As to mere irregularities the court may ratify them, "and whenever there is a power of ratification, the principle prevails that a subsequent ratification is equivalent to a previous authorization;" therefore, as to all such irregularities, upon the entry of the order of confirmation, they become *res adjudicata*.² For example, after a confirmation it cannot be defeated by showing collaterally a defect in the notice,³ or that the officer did not strictly follow the directions of the decree,⁴ or that he had no authority to make the sale,⁵ or that the property was sold *en masse*.⁶ So, in the absence of a charge of fraud, the fact that the officer sold on a different day than that named in the notice of the sale is an irregularity that is cured by confirmation.⁷ But the rule is different if the land should be sold for an inadequate price, brought about by a fraudulent sale on a day different from that named in the notice.⁸ If the officer departs from the terms of the sale as ordered by the court, the court may ratify his action by a confirmation of the sale, "provided the terms, as changed, are such as the court had power to impose in the first instance."⁹ But the court cannot ratify an order which it had originally no power to make; hence, if the order of sale was void for want of jurisdiction, an order of confirmation can impart to it no vitality or force.¹⁰ The sale being void, there is no subject-

¹ Freeman on Executions, sec. 307.

² Id., § 3047; Evans v. Spurgin, 6 Gratt. 107, 52 Am. Dec. 105; Harrison v. Harrison, 1 Md. Ch. Dec. 331; Rorer, Jud. Sales, §§ 109, 125, 329.

³ Wyant v. Tuthill, 17 Neb. 495.

⁴ McGavock v. Bell, 3 Cold. (Tenn.) 512.

⁵ Core v. Strickler, 24 W. Va. 689.

⁶ Clark v. Glos, 180 Ill. 556, 54 N. E. 680, 72 Am. St. R. 328.

⁷ Conover v. Musgrave, 68 Ill. 58.

⁸ McConnel v. Gibson, 12 Ill. 128.

⁹ Jacob's Appeal, 23 Pa. St. 477; Emery v. Vroman, 19 Wis. 689, 88 Am. Dec. 726; Thorn v. Ingram, 25 Ark. 58; Freeman, Void Jud. Sales, § 44.

¹⁰ Townsend v. Tallant, 33 Cal. 54,

matter upon which the confirmation can act. If the court had no jurisdiction to order a sale, it has none to confirm it. Where there is no power to render a judgment, or make an order, there can be none to confirm or execute it.¹

It must be remembered, however, that there is a distinction between a ratification by confirmation on the part of the court, and a ratification by an act of a party; for while the court cannot, by a confirmation or otherwise, make a void sale binding upon anybody, yet it seems the parties may, by their act, ratify a void judicial sale, so as to estop them from asking it to be vacated. Where a party desires to set aside a sale on the ground of inadequacy of price, his objection must be made promptly. This rule applies also to other irregularities, such as insufficient notice. The reason of the rule requiring the party to make his objections within a short time after the sale has been had is "that if a resale of the premises is to be ordered that it shall be done before any change of position has occurred on the part of any of the parties to the controversy, and before rights have been acquired in the property which may be prejudiced by any such order."² The whole matter is summed up in few words by the supreme court of Illinois, as follows: A party failing to object to a master's report of sale, on coming into a court of equity, after the period for redemption has elapsed, will not be heard to impeach the sale except by showing fraud or oppression, and, probably, also by showing a reasonable excuse for the delay. He will not be permitted to "play fast and loose" by avoiding the sale, if it afterward proves to his interest to do so, or permitting the purchaser to hold the property. There must be some stability in judicial sales, and, therefore, parties seeking to avoid a sale must not be permitted to succeed if they have unreasonably slept on their rights.³ The maxim of the law is: *Vigilantibus et non dormientibus jura subveniunt*: 'The laws assist those who are vigilant, not those who sleep on their rights.' Therefore all

91 Am. Dec. 617; Bethel v. Bethel, 6 Bush (Ky.), 65; Shriver's Lessee v. Lynn, 2 How. (U. S.) 43.

¹ Minn. Co. v. St. Paul Co., 2 Wall. (U. S.) 609; Gaines v. New Orleans, 6 Wall. (U. S.) 642; Hawkins v. Hawkins, 28 U. S. 79; Pike v. Wassall, 94

U. S. 74; Freeman, Void Jud. Sales, § 44.

² McBride v. Gwynn, 83 Fed. 402; Bullard v. Green, 10 Mich. 266; Leonard v. Taylor, 12 Mich. 398; Goodwin v. Burns, 21 Mich. 211.

³ Fergus v. Woodworth, 44 Ill. 874.

mere irregularities may be waived by delay in applying to have the sale vacated.¹

§ 615. Waiver of right of objection — Recapitulation — Continued.— *Fourth.* The right to attack a judicial sale may be barred by laches; that is, by mere lapse of time.

The general effect of laches upon a party's right to proceed in equity has been fully and thoroughly set forth in a former chapter,² and much of what was said under the last heading, in the two preceding sections, is equally applicable here, so there remains little to be added upon the subject. All mere irregularities are waived unless the party complaining shall, within a reasonable time, take the necessary steps to avoid the sale. He cannot lie by an unreasonable time and then ask relief, but must act promptly. Thus, where the ground relied upon was that the sale was in fact made by an agent or attorney, instead of the person intrusted with the power, it was held that a party who had actual notice of the sale could not, after the lapse of over four years, come into a court of chancery for relief without giving some equitable excuse or explanation for the delay, he having lived in the same county where the land was situated all that time.³ So, too, a party desiring to attack a sale on any ground whatever must do so at the proper time. For example, a party in the upper court objected, for the first time, that the master sold the property *en masse*, instead of in parcels, as it was contended he should have done. The court overruled the contention, saying that "no objections were filed or made in the court below to said report, and there is no evidence whatever in this record to show any fraud was practiced, or that the plaintiffs in error or either of them were injured, or that the property was susceptible of division. How can plaintiffs in error raise this question first in this court, having made no objections in the court below, supported by proof."⁴

¹ Clark v. Glos, 180 Ill. 556, 573, 574, 54 N. E. 680, 72 Am. St. 223; Noyes v. True, 23 Ill. 503; Durham v. Heaton, 28 Ill. 264; Prather v. Hill, 86 Ill. 402; Morgan v. Evans, 72 Ill. 586, 22 Am. R. 154; Hay v. Baugh, 77 Ill. 500; McHany v. Schenk, 88 Ill. 357; Dobbins v. Wilson, 107 Ill. 17; Speck v. Pullman Palace Car Co., 121 Ill. 33,

57, 12 N. E. 213; Freeman on Void Judicial Sales, sec. 44, and authorities cited in note 3.

² *Ante*, §§ 410-411.

³ McHany v. Schenk, 88 Ill. 357, 365. See also Munn v. Burges, 70 Ill. 504.

⁴ Dates v. Winstanley, 53 Ill. App. 628, 628.

All that the law requires is that the dissatisfied party shall use that degree of diligence which a man of ordinary prudence exercises in the discovery of his ground of complaint and the same promptness in his application for relief. No rule can be laid down applicable to all cases, but, on the contrary, a court of equity is left free to act in each case as justice may require. Even the statutory period of limitations, which is absolutely binding upon a court of law, does not necessarily control a court of equity. The supreme court of Illinois lay down the principle governing courts of equity, in such cases, as follows: "Numerous cases have been decided by this court where delay for a much less period than that fixed by the statute of limitations has been held to preclude the right of the party to bring the suit. In such cases, it is said, courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, the prosecution of the suit, and no general rule can be laid down for the guidance of the court in every case. A delay which might have been of no consequence in an ordinary case may be amply sufficient to bar the title to relief where the property is of a speculative character or is subject to contingencies, or where the rights or liabilities of others have in the meantime been varied. If the property is of a speculative or precarious nature, it is the duty of the party complaining of fraud to put forward his complaint at the earliest possible time. He cannot be allowed to remain passive, prepared to affirm the transaction if the concern should prosper, or to repudiate it if that should prove to his advantage."¹

Mr. Justice Harlan, of the supreme court of the United States, speaking for that court says: "Whether equity will interfere in cases of this character must depend upon the special circumstances of each case. Sometimes the courts act in obedience to statutes of limitations; sometimes in analogy to them. But it is now well settled that, independently of any limitation prescribed for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice

¹ Williams v. Rhodes, 81 Ill. 571, 857; Hoyt v. Pawtucket Inst. for 588; Connely v. Rue, 148 Ill. 207, 220; Savings, 110 Ill. 390; Speck v. Pull-Hamilton v. Lubukee, 51 Ill. 415, 99 man Palace Car Co., 121 Ill. 33, 12 N. Am. Dec. 562; Bush v. Sherman, 80 E. 213. Ill. 160; McHany v. Schenk, 88 Ill.

would be done, in the particular case, by granting the relief asked. It will, in such cases, decline to extricate the plaintiff from the position in which he has inexcusably placed himself, and leave him to such remedies as he may have in a court of law."¹

Laches is an equitable defense, and there is no artificial, fixed or determinate rule on this subject, but each case as it arises must be decided according to its own particular circumstances. Courts of equity never give encouragement to the enforcement of stale or antiquated demands. In certain cases a comparatively brief period will be sufficient to bar a claim on the ground of laches, while in others courts will not stop short of the time of the statute of limitations.² As stated in a previous section, one of the grounds upon which courts of equity refuse to encourage the prosecution of stale demands is "for the peace of society;"³ and another ground upon which courts of equity refuse relief where the plaintiff is guilty of laches is the injustice of imposing upon the defendant the necessity of making proof of transactions long past, in order to protect himself in the enjoyment of rights which, during a considerable period, have passed unchallenged by his adversary, with full knowledge of all the circumstances. Length of time necessarily obscures all human evidence, and deprives parties of the means of ascertaining the nature of original transactions; it operates by way of presumption in favor of the party in possession. Long acquiescence and laches by par-

¹ *Abraham v. Ordway*, 158 U. S. 416, 420, 15 Sup. Ct. Rep. 894, citing *Wagner v. Baird*, 7 How. 284, 288; *Harwood v. Railroad Co.*, 17 Wall. 78, 81; *Sullivan v. Portland, etc. R. R. Co.*, 94 U. S. 806, 811; *Brown v. County of Buena Vista*, 94 U. S. 157, 159; *Hayward v. National Bank*, 96 U. S. 611, 617; *Lansdale v. Smith*, 106 U. S. 891, 892; *Speidel v. Henrici*, 120 U. S. 877, 887, 7 Sup. Ct. R. 610; *Richards v. Maokall*, 124 U. S. 183, 8 Sup. Ct. R. 437. See also *Moore v. Greene*, 19 How. (U. S.) 69, 72; *Beaubien v. Beaubien*, 28 How. (U. S.) 190; *Badger v. Badger*, 2 Wall. 87, 94; *New Albany v. Burke*, 11 Wall. 96,

107; *Upton v. Tribilcock*, 91 U. S. 45; *Godden v. Kimmell*, 99 U. S. 201; *Wood v. Carpenter*, 101 U. S. 135; *Hoyt v. Sprague*, 103 U. S. 613; *Philippi v. Philippi*, 115 U. S. 151, 157, 5 Sup. Ct. R. 1181; *Hanner v. Moulton*, 138 U. S. 386, 387, 11 Sup. Ct. R. 408; *Underwood v. Dugan*, 139 U. S. 380, 383, 11 Sup. Ct. R. 618; *Hammond v. Hopkins*, 143 U. S. 224, 274, 12 Sup. Ct. R. 418.

² *Landrum v. Union Bank of Missouri*, 68 Mo. 48, 56.

³ *Williams v. Rhoads*, 81 Ill. 571, 578; *Abraham v. Ordway*, 158 U. S. 416, 422, 15 Sup. Ct. R. 894; 2 Story Eq., sec. 1520.

ties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the chancellor.¹

IX. RIGHTS AND REMEDIES FOR AND AGAINST PURCHASERS.

§ 616. **Force and effect of bidder's contract.**—As has been already shown in a previous part of this chapter,² at any time before the hammer falls, the purchaser is at liberty to retract his bid; but after the property has been knocked off to him his right to retract is gone, the contract being then a binding one upon him, subject to its approval by the court, his only chance of release then depending on his ability to show to the court that some fraud has been practiced upon him, or that some irregularity has intervened, which renders it inequitable to enforce the contract. Yet, in rare cases, although no positive fraud or irregularity is shown to exist, the contract may be so unreasonable that the court will decline to enforce it, but, on the contrary, will deprive the purchaser of his bargain, or release him or relieve him of a hardship, as equity may require. For example, the price may be so grossly inadequate as to compel the court to deprive the bidder of his bargain; and, on the other hand, in one case at least, it has been held that, under the circumstances, the price was so exorbitant as to require the court to release the purchaser. Except, however, in such rare instances, the purchaser is expected and required to look out for his own interests, for he can have no relief merely on the ground that he has made a bad bargain. Where the sale has been properly conducted, and the purchaser can complete his contract, he will be held strictly to his agreement. Where, however, the contract is unreasonable, it is said that the court will relieve the purchaser as well

¹ *Wagner v. Baird*, 7 How. (U. S.) Pl. & Pr. 828 *et seq.*; also *Rose's Notes* 258; *Abraham v. Ordway*, 158 U. S. to U. S. Reports, vol. 4, pp. 703-705, 416, 421, 15 Sup. Ct. R. 894. For a and 750-752, where all the leading more complete discussion of the gen- cases are cited.
eral doctrine of laches, see *ante*, ² *Ante*, § 581.
§§ 410, 411; and see also 12 Encyc.

as the seller. Thus, in *Savile v. Savile*¹ a purchaser at a sale made under an order of the court, which took place during the delusion created by the South Sea Bubble, was discharged from his purchase on submitting to a forfeiture of his deposit of £1,000, on the ground of the exorbitance of the price, the court remarking that "a court of equity ought to take notice under what a general delusion the nation was at the time the contract was made." Daniell says, however, of this case that there is now some doubt whether the purchaser will be relieved from his bargain merely on the ground that he has contracted to pay a price beyond the value of the estate.²

When, however, the purchaser has, by mistake, given an unreasonable price for an estate, the court will, in a proper case, wholly rescind the contract. Thus, a sale was set aside, at the instance of the purchaser, on account of a serious mistake in the representation of the lands sold.³ So where the auctioneer knocked off the property by mistake to one who was not the highest bidder, the auctioneer not hearing the higher bid.⁴ If by any wrongful act of the officer, party, auctioneer or any one else connected with the sale, the purchaser is fraudulently induced to bid a greater sum than he otherwise would have done, equity will grant him relief by setting the sale aside.⁵ Whether or not a court of equity will grant relief to a purchaser where a mistake is made as to the quantity of the land purchased, in the absence of any concealment or deception, is a question not well settled by the courts.⁶ It seems, however, to be generally understood that where the contract has been consummated without any fraud, misrepresentation or concealment as to the real quantity, the courts will not inquire whether there has been an actual mistake as to the supposed quantity contained within certain specified boundaries.⁷ But wherever there has been either fraud or

¹ 1 P. Wms. 745.

² 2 Daniell, Ch. Pr. (1st ed.) 921, 922.

³ *Gordon v. Sims*, 2 McCord Ch. 159; *Laight v. Pell*, 1 Edw. Ch. 577.

⁴ *Gordon v. Sims*, 2 McCord Ch. 159; *Anderson v. Foulke*, 2 Harr. & G. 346; *Campbell v. Gardner*, 11 N. J. Eq. 423, 69 Am. Dec. 598; 2 Daniell, Ch. Pr. (1st ed.) 922.

⁵ *Veazie v. Williams*, 8 How. (U. S.)

184.

⁶ *Thomas v. Perry*, 1 Pet. C. C. 58, Fed. Cas. 18,908; *Reynolds v. Vance*, 4 Bibb, 215; *Winch v. Winchester*, 1 Ves. & Beam, 875, note and cases cited.

⁷ *Veeder v. Fonda*, 3 Paige, 94, 98.

concealment, or anything beyond a mere mistake, on both sides, as to quantity, a court of equity ought not to enforce the contract against the party who has been deceived.¹ It is the policy of the courts to encourage confidence and stability in judicial sales and thus secure fair competition. For this purpose it is necessary that purchasers at such sales should understand that no deception whatever will be permitted to be practiced upon them; that in a contract between them and the court they will not be compelled to carry that contract into effect under circumstances where it would not be perfectly just and conscientious in an individual to insist upon the performance of the contract against the purchaser, if the sale had been made by such individual.²

§ 617. **What the purchaser has a right to insist upon.**—After the sale is made the purchaser, unless there is some just ground for setting it aside, has a right to insist upon its completion by confirmation, and the owner cannot then prevent its completion and confirmation of the master's report by a tender of the amount due under the decree, with interest and costs.³ In case he fails to secure compliance with the terms of sale and a resale is ordered, the purchaser at the prior sale is entitled to be reimbursed as follows: 1. Costs and expenses, including reasonable counsel fees for examining the title. 2. A return of his deposit money, if any, paid to the master. 3. Interest on such deposit money while in the hands of the master. 4. Interest upon the residue of the purchase-money while it remained unproductive in his hands.⁴ Having complied with his part of the contract by payment of the purchase price, or, what is the same thing, standing ready to comply, the purchaser has the right to insist upon title. After confirmation each party occupies the same position, that is, each party is entitled to a specific execution of the contract as against the other; that is to say, the vendors, or holders of the title, making the sale through the agency of the court, by the order of confirmation have the right to call on the purchaser to pay the money and take the title, and the purchaser has the reciprocal right to call on the vendors to accept the money

¹ Id.

³ Brown v. Frost, 10 Paige, 243, 247.

² Veeder v. Fonda, 8 Paige, 94, 97.

⁴ American Ins. Co. v. Oakley, 9 Paige, 259, 264.

and execute title to him.¹ He bids understanding that he is to get the title of the defendant, and if the sale proves to be void, for any reason, his bid cannot be enforced against him.² Having paid his money he is entitled to title, and if he fails to get it is entitled to a return of his money. As to who is liable to him, whether the plaintiff or defendant, the rule is different in the different states. In some the plaintiff is held liable,³ while in others the defendant is the party held liable;⁴ but, in any event, the purchaser cannot be compelled to complete his purchase where he cannot get title.⁵ In case any difficulty arises as to the title of property sold at a public sale, the court will refer the matter to a master, to examine and report thereon,⁶ and if the master reports that it cannot, will relieve the purchaser from his obligation to complete his purchase.⁷ Having complied with his part of the contract, and the period of redemption having expired where it exists by statute, the purchaser has the right to possession of the property, and, as we shall see in a subsequent section, has the right, where the parties in possession fail or refuse to surrender, to insist upon the assistance of the court to obtain it.⁸

§ 618. **Compelling performance of the contract.**—A party bidding at a judicial sale thereby makes himself a party to the suit, and subjects himself to the jurisdiction of the court for all orders necessary to protect his rights, or to compel the performance of the contract.⁹ Under the rules of practice in the

¹ *Edney v. Edney*, 80 N. C. 81, 83.

² *Freeman*, *Void Jud. Sales*, § 48; *Thrift v. Fritz*, 7 Ill. App. 55; *Stoney v. Schultz*, 1 Hill (S. C.), Ch. 465, 27 Am. Dec. 429; *Boykin v. Cook*, 61 Ala. 472; *Burns v. Ledbetter*, 44 Miss. 533; *Barrett v. Churchill*, 18 B. Mon. (Ky.) 387; *Verdin v. Slocum*, 71 N. Y. 845; *Dodd v. Neilson*, 90 N. Y. 243.

³ *Chapman v. Brooklyn*, 40 N. Y. 372; *Schwinger v. Hickok*, 53 N. Y. 280; *Henderson v. Overton*, 2 Yerg. 394, 24 Am. Dec. 493; *Ritter v. Henshaw*, 7 Iowa, 97; *Sanders v. Hamilton*, 3 Dana (Ky.), 550.

⁴ *Meier v. Craig*, 3 Blackf. (Ind.) 293, 25 Am. Dec. 111; *Julian v. Beal*, 26 Ind. 220; *McGhee v. Ellis*, 4

Litt. (Ky.) 245, 14 Am. Dec. 24; *Price v. Boyd*, 1 Dana (Ky.), 436; *Howard v. North*, 5 Tex. 290, 51 Am. Dec. 769; *Warner v. Helm*, 1 Gilm. (Ill.) 220; *Wilchinsky v. Cavendar*, 72 Mo. 192; *Burns v. Ledbetter*, 56 Tex. 282.

⁵ *McGown v. Wilkins*, 1 Paige, 120; *Seaman v. Hicks*, 8 Paige, 655; *Ormsby v. Terry*, 6 Bush, 553; *Rorer*, *Jud. Sales*, § 150.

⁶ *McComb v. Wright*, 4 Johns. Ch. 659.

⁷ 2 *Jones on Mortgages*, § 1648; *Graham v. Bleakie*, 2 Daly (N. Y.), 55; *Thomas v. Davidson*, 76 Va. 338.

⁸ *Post*, §§ 618–619.

⁹ *Kneeland v. American L. & Tr.*

federal courts it is settled that a purchaser, by his bid, becomes a *quasi*-party to the suit, and is affected with notice of every step subsequently taken in the case relating to the purchase and the title acquired thereby.¹ This rule also holds good even as to sureties of the purchaser, executing with him notes for deferred payments,² and as such party or *quasi*-party, so bringing himself within the jurisdiction of the court, has a right to be heard upon all questions thereafter arising affecting his bid, or his rights thereunder.³ Having thus submitted himself to the court's jurisdiction, he may be, by summary process, compelled to complete his purchase,⁴ thus rendering a new or separate suit wholly unnecessary,⁵ the remedy being by motion in the same cause.⁶

The proceeding is as follows: The master reports the sale and the failure or refusal of the bidder to complete his contract by payment of the purchase price. A motion is then made for a rule upon the purchaser to pay on or before a day fixed by the court, and that, in default of such payment, an order for a

Co., 136 U. S. 89, 10 Sup. Ct. R. 950; *Stuart v. Gay*, 127 U. S. 518, 8 Sup. Ct. R. 1279; *Requa v. Rea*, 2 Paige, 339; *Atkinson v. Richardson*, 14 Wis. 157, 18 Wis. 244; *Gordon v. Saunders*, 2 McCord's Eq. 151; *Stimson v. Mead*, 2 R. L. 541; *Coffey v. Coffey*, 16 Ill. 141; *Clarkson v. Read*, 15 Gratt. 288; *Cazet v. Hubbell*, 36 N. Y. 647; *Brasher v. Cortlandt*, 2 Johns. Ch. 505; *Casamajor v. Strody*, 1 Sim. & St. 381; *Landsdown v. Elderton*, 14 Ves. 512.

¹ *State of Tennessee v. Quintard*, 80 Fed. 829, 835; *Davis v. Trust Co.*, 152 U. S. 590, 14 Sup. Ct. R. 693; *Kneeland v. Trust Co.*, 136 U. S. 89, 10 Sup. Ct. 950; *Stuart v. Gay*, 127 U. S. 518, 8 Sup. Ct. R. 1279; *Blossom v. Railroad Co.*, 1 Wall. 655; *Muse v. Donelson*, 2 Humph. 166; *Allen v. East*, 4 Baxt. 308; *Reese v. Copeland*, 6 Lea, 190.

² *Deaderick v. Smith*, 6 Humph. 188; *Munson v. Payne*, 9 Heisk. 672; *State of Tennessee v. Quintard*, 80 Fed. 829, 835.

³ *Blossom v. Milwaukee & C. R. Co.*, 1 Wall. 655; *Swann v. Wright's Ex'rs*, 110 U. S. 590, 4 Sup. Ct. R. 235; *Williams v. Morgan*, 111 U. S. 684, 4 Sup. Ct. R. 638; *Kneeland v. American L. & Tr. Co.*, 136 U. S. 95, 10 Sup. Ct. R. 950.

⁴ *Gross v. Pearoy*, 2 Pat. & H. 483; *Planters' Bank v. Fowlkes*, 4 Sneed, 461; *Blackmore v. Barker*, 2 Swan, 840; *Stimson v. Mead*, 2 R. L. 541; *Cazet v. Hubbell*, 36 N. Y. 877; *Hill v. Hill*, 58 Ill. 239; *Vance's Adm'r v. Foster*, 9 Bush, 389; *Allred v. McGahagan*, 39 Fla. 118, 21 So. 802; *McCarter v. Finch*, 55 N. J. Eq. 245, 86 Atl. 937.

⁵ *Camden v. Mayhew*, 129 U. S. 78, 9 Sup. Ct. R. 246; *Stuart v. Gay*, 127 U. S. 518, 8 Sup. Ct. R. 1279.

⁶ *Wood v. Mann*, 8 Sumn. 818, 826, Fed. Cas. 17,954; *Requa v. Rea*, 2 Paige, 339; *Brasher v. Cortlandt*, 2 Johns. Ch. 505; *Landsdown v. Elderton*, 14 Ves. 512; *Casamajor v. Strodz*, 1 Sim. & St. 381; *Cazet v. Hubbell*, 36 N. Y. 677.

resale will be entered at his risk unless he shows cause to the contrary. Due notice of such motion is given and the rule so entered. The purchaser having failed to pay by the day named, and failing to show cause to the contrary, an order is entered to resell at his risk and expense.¹ Where a second sale is made under such order, and the property sells for less than the amount bid at the former sale, the delinquent purchaser may be compelled, by attachment, to pay the difference, no new suit being required.² The foregoing is the regular course of proceeding. A bill in chancery is not the proper remedy.³ On the hearing of such motion before the court, *ex parte* affidavits may be read or the matter may be referred to a master in chancery.⁴

§ 619. **Compelling performance of the contract — Continued.**— As a part of the completion of the transaction the court will see that the purchaser gets possession of the property. Rights and obligations in this regard are mutual. The purchaser is under obligation to complete his contract by payment of the purchase price and, upon default, may be compelled to do so by the court; and having done so, it is the duty of those in possession to surrender the same to the purchaser, and, upon failure or refusal so to do, the court has the power to compel such surrender. For this purpose counsel should always be careful to make the parties in actual possession of the premises parties to the suit. As to when the purchaser is entitled to possession is usually provided for by statute, and these statutory provisions are not uniform in the different states.

In Illinois the statute requires the master, upon making a sale, to deliver to the purchaser a certificate of sale. This certificate of purchase does not purport to convey title, but on its face shows the contrary, by stating the amount of the bid and when the holder will be entitled to title if the premises are not redeemed. A purchaser is not entitled to possession by

¹ Clarkson v. Read, 15 Gratt. 288; Hill v. Hill, 58 Ill. 239; Gross v. Percy, 2 Pat. & H. 483, 2 Smith, Ch. Pr. 204, 205; Rorer, Jud. Sales, § 159.

² Camden v. Mayhew, 129 U. S. 73, 9 Sup. Ct. R. 246; Stuart v. Gay, 127 U. S. 518, 8 Sup. Ct. R. 1279.

³ Hill v. Hill, 58 Ill. 239.

⁴ Robertson v. Smith, 94 Va. 250, 26 S. E. 579, 64 Am. St. 723; Griel v. Randolph, 108 Ala. 601, 18 So. 609; Harder v. Commission Co., 61 Ark. 66, 31 S. W. 979.

showing that he bid off the land at a sale.¹ The purchaser of land under an execution or the foreclosure of a mortgage has no legal title, or right to be invested with a legal title, until the time allowed for redemption has expired.² The certificate of purchase confers on the holder no title in the land.³ In *Hays v. Cassell*, 70 Ill. 669, it was said:⁴ "The certificate of purchase conveys no title to the purchaser, nor does it disturb the possession of the defendant. That still continues in him, and so remains until fifteen months has elapsed and his title transferred by the sheriff's deed." A court has no power to award possession to a purchaser before the expiration of the period of redemption, and such purchaser is not entitled to possession before the execution of a master's deed to him. The certificate of purchase only entitles him to receive the legal title at a future time, upon a certain condition, and a decree is erroneous and will be reversed which awards possession before that time.⁵ In other words, a purchaser cannot invoke the aid of the court until after he has obtained his deed.⁶ There is no settled practice entitling a subsequent purchaser from the purchaser at a master's sale, as a matter of right, to the assistance of the court to obtain possession of the premises which his grantor purchased under the decree, and such assistance should not be given when there is a strong probability that injustice will be done to the person in possession by so doing.⁷

§ 620. **Compelling performance of the contract — Continued.**— As stated in the last section, after the purchaser is entitled to possession he may invoke the assistance of the court if those whose duty it is to surrender the premises fail or refuse so to do.⁸ For the purpose of obtaining a fair price for the premises at judicial sales, it is important that purchasers

¹ *Johnson v. Baker*, 88 Ill. 98, 87 Am. Dec. 208. *nenberger v. Heinemann*, 190 Ill. 17.

² *Rockwell v. Servant*, 63 Ill. 424.

³ *Huftalin v. Misner*, 70 Ill. 55.

⁴ Page 672.

⁵ *Bennett v. Matson*, 41 Ill. 332; *Myers v. Manny*, 63 Ill. 211; *Lightcap v. Bradley*, 100 Ill. 510, 528, 529, 58 N. E. 221.

⁶ *Mitchell v. Bartlett*, 51 N. Y. 477; *Bennett v. Matson*, 41 Ill. 332; *Myers v. Manny*, 63 Ill. 211, 213, 214; *Kro-*

⁷ *Van Hook v. Throckmorton*, 8 Paige, 33, 35.

⁸ *Suffern v. Johnson*, 1 Paige, 456, 19 Am. Dec. 440; *Williams v. Waldo*, 4 Ill. 264; *Kershaw v. Thompson*, 4 Johns. Ch. 609; *Frelinghuysen v. Colden*, 4 Paige, 203; *Van Hook v. Throckmorton*, 8 Paige, 33; *Creighton v. Paine*, 3 Ala. 158; *McGown v. Wilkins*, 1 Paige, 121.

should know that, as against parties to the suit and those who come into possession under them pending the litigation, the court will compel the surrender of possession to the purchaser, without driving him to the trouble and expense of an ejectment suit.¹ For this purpose all those who are actual parties to the suit are, of course, subject to the jurisdiction and orders of the court, and for this reason counsel should always be careful to see that all persons in possession are made parties to the suit.

A purchaser *pendente lite* is to all intents and purposes a party to the decree, and, for the purpose of enforcing the decree, the same proceedings may be had against him as if he was a party to the suit. He who meddles with the property in controversy becomes by that act a party, and as to him, indeed as to all the world, the doctrine of *lis pendens* applies until the decree is executed by delivery of possession to the purchaser.² The law is that the final decision of the court will be binding, not only on the parties litigant, but also on those who derive title under them by alienation made pending the suit.³ A purchaser *pendente lite* from a party to a suit is, to all intents and purposes, a party to the decree,⁴ because the same proceedings can be taken against him which can be taken against the original party. Such purchaser is as conclusively bound by the result as if he had been a party from the outset. If this were not the rule, parties might, by transferring their interests during the pendency of the suit, defeat its whole purpose, and make the litigation endless.⁵ This doctrine of *lis pendens* begins from the service of summons or subpoena after

¹ McGown v. Wilkins, 1 Paige, 120.

² Jackson v. Warren, 32 Ill. 831, 840.

³ Norris v. He, 152 Ill. 190, 199, 88 N. E. 762, 43 Am. St. R. 238; Moore v. Jenks, 173 Ill. 157, 165, 50 N. E. 698; Loomis v. Riley, 24 Ill. 307, 310; Jackson v. Warren, 32 Ill. 831, 840; Dickson v. Todd, 43 Ill. 504; Tilton v. Cofield, 93 U. S. 163, 168; Murray v. Lylburn, 2 Johns. Ch. 441; White v. Carpenter, 2 Paige, 217, 252; Murray v. Ballou, 1 Johns. Ch. 566; Bishop of Winchester v. Beavor, 3 Ves. 314,

and note p. 316; Gaskell v. Durdin, 3 Ball & Beatty, 147; 1 Story's Eq. Jur., §§ 405, 406; 2 Pomeroy, Eq. Jur., § 632.

⁴ Whether he becomes a party to the record or not he becomes, to all intents and purposes, a party to the suit. Loomis v. Riley, 24 Ill. 307, 310; Jackson v. Warren, 32 Ill. 831, 840; Norris v. He, 152 Ill. 190, 199, 88 N. E. 762, 43 Am. St. R. 238.

⁵ Norris v. He, 152 Ill. 190, 199, 88 N. E. 762, 43 Am. St. R. 238; Murray v. Ballou, 1 Johns. Ch. 566.

filing of the bill.¹ A purchaser acquiring a *bona fide* interest in the real estate at any time before service of process will be protected;² and if there is no service of process the rule of *lis pendens* applies from the time of the entry of the appearance of the party from whom the purchase is made.³ Not only the doctrine of *lis pendens* does not apply until the service of process, but this service of process must be *after* the bill is filed. If it is *before* the service it is a nullity.⁴ If possession of the property is transferred *after* filing the bill and *before* the service of process, the careful pleader will amend his bill by making those who thus obtain possession parties to the suit, and, by so doing, subject them to the jurisdiction of the court. The *bona fide* holder of negotiable paper, whether notes or bonds, is not subject to the doctrine of *lis pendens*. This exception to the general rule holds good though the paper is purchased during the pendency of the suit in which it is finally declared invalid.⁵

The method of procedure where the party in possession refuses to surrender to the purchaser, as laid down in the books, is as follows: Demand for possession is made upon the party, and, upon his refusal to surrender, a motion is made for an order upon him to surrender. Upon the hearing such motion should be supported by affidavits, upon which the court enters the order commanding the party to deliver possession to the purchaser. This order should be served by copy, and, in case of disobedience, an injunction issues to deliver possession, which issues of course, on affidavit of the previous steps, and then on affidavit of service of the injunction and refusal, a *writ of assistance* to the sheriff to put the party in possession issues of course,

¹ Id. See also *Grant v. Bennett*, 96 Ill. 518; *Hallorn v. Trum*, 125 Ill. 247, 253, 17 N. E. 823; *Franklin Savings Bank v. Taylor*, 181 Ill. 376, 384, 23 N. E. 397; *Bishop of Winchester v. Paine*, 11 Ves. 194; *Murray v. Ballou*, 1 Johns. Ch. 566, 580.

² *Farmers' Loan, etc. Co. v. Lake St. Rd. Co.*, 177 U. S. 51, 60, 20 Sup. Ct. R. 564; *Miller v. Sherry*, 2 Wall. (U. S.) 237, 250; *Haughwout v. Murphy*, 22 N. J. Eq. 531; *Grant v. Bennett*, 96 Ill. 518, 522, and cases

there cited; *Murray v. Ballou*, 1 Johns. Ch. 566, 576; *Hayden v. Bucklin*, 9 Paige, 512.

³ *Franklin Savings Bank v. Taylor*, 181 Ill. 376, 384, 23 N. E. 397.

⁴ *Hodgen v. Guttery*, 58 Ill. 431, 435; *Hayden v. Bucklin*, 9 Paige, 512.

⁵ *Farmers' Loan & Trust Co. v. Toledo & S. H. R. Co.*, 54 Fed. 759, 772; *City of Lexington v. Butler*, 14 Wall. 282; *County of Warren v. Marcy*, 97 U. S. 96, 105; 2 Beach, Priv. Corp., § 666c.

on motion without notice.¹ Chancellor Kent says that the forms of process above mentioned "are all to be found in the older books of practice; and the same course of proceeding in decrees concerning land is declared and laid down both in the old and modern books."²

§ 621. When purchaser is charged with notice of irregularities.— Where the bidder at a sale is a party to the action he is chargeable with notice of all irregularities in the manner and mode of making the sale.³ He is chargeable with notice of the value of the property and of the legal rules bearing upon the transaction;⁴ and his grantee succeeds to his rights and none other. The rule applying to strangers who purchase in good faith at a judicial sale, and to the grantee of such stranger purchaser, has no application.⁵ An attorney of one of the parties to the suit is also chargeable with such notice when he becomes a purchaser.⁶ But the rule applicable to a *stranger* to the record is wholly different. If a stranger to the record becomes a purchaser at a master's sale he is not chargeable with notice of any irregularity in the proceedings, and if his purchase is *bona fide* he will be protected.⁷ A stranger to the record purchasing at a judicial sale is only chargeable with —

First. Actual notice of irregularities, that is, actual knowledge.

Second. He must see that the court had jurisdiction of the subject-matter and of the parties.

Third. That the decree or order of court authorizes the sale.

Fourth. He is not required to go through the record to see whether it contains any irregularities.⁸

¹ Kershaw v. Thompson, 4 Johns. Ch. 609, 614.

² Id. 615.

³ Henderson v. Harness, 184 Ill. 520, 530, 56 N. E. 786; Curtis v. Hitchcock, 10 Paige, 399, 408; Jackson v. Caldwell, 1 Cowen, 622, 644; Simmons v. Catlin, 2 Caines' R. 61; Stewart v. Croes, 5 Gilm. (Ill.) 442; Smith v. Huntoon, 134 Ill. 24, 28, 24 N. E. 971, 23 Am. St. R. 646; Fergus v. Woodworth, 44 Ill. 374, 384.

⁴ Morris v. Robey, 73 Ill. 462, 468.

⁵ Smith v. Huntoon, 134 Ill. 24, 30, 31, 24 N. E. 971, 23 Am. St. R. 646;

Reynolds v. Harris, 14 Cal. 667, 76 Am. Dec. 459; Turner v. Bank, 78 Ind. 19; Ayers v. Campbell, 9 Iowa, 213.

⁶ Stewart v. Croes, 5 Gilm. (Ill.) 442.

⁷ Curtis v. Hitchcock, 10 Paige, 399, 408; Jackson v. Rosevelt, 13 Johns. 97; Jackson v. Cadwell, 1 Cowen, 622, 644.

⁸ Buckmaster v. Carlin, 8 Scam. (Ill.) 104; Fitzgibbon v. Lake, 29 Ill. 165, 81 Am. Dec. 302; Mulford v. Stalzenback, 46 Ill. 303, 310; Conover v. Musgrave, 68 Ill. 58, 63.

The law proceeds upon the ground that a party to the suit is bound to know whether the judgment or decree is regular, and if it is not, and he becomes a purchaser, he does so with a full knowledge of the error and irregularities contained in the record or found in the proceeding. But the rule is confined to parties to the record and their attorneys. The rule charges nothing to a stranger to the record except that he sees that the court has jurisdiction of the subject-matter, and of the parties, and that there is such a judgment or decree unreversed as authorizes the sale. If the rule were otherwise no one would become a purchaser at a judicial sale, all competition would cease, and plaintiffs would become purchasers at their own price.¹

§ 622. Reversal of decree—Effect upon rights of purchaser.—If the court had jurisdiction to render the judgment or pronounce the decree, that is, if it had jurisdiction over the parties and the subject-matter, then, upon principles of universal law, acts performed and rights acquired by third persons under the authority of the judgment or decree, and while it remains in force, must be sustained, notwithstanding a subsequent reversal. The necessity of this rule, as founded upon important considerations of public policy, is too apparent to admit of dispute. When the validity of acts done under a judicial proceeding is collaterally called in question, we have to look only to the jurisdiction, and if that is found to have existed, then it matters not how erroneous the proceedings of the court may have been. The rights of third persons, acquired while such proceedings were unreversed, and by virtue of them, must be protected, notwithstanding a subsequent reversal. Society should be able to rely upon the judgments and decrees of its courts, and although it knows that they are liable to be reversed, yet it has the right, so long as they stand, to presume they have been properly rendered. The contrary doctrine would be fatal to judicial sales and to the marketable value of titles derived from them.² Destroy faith in the judg-

¹ *Fergus v. Woodworth*, 44 Ill. 874, Ill. 519, 523; *Young v. Lorain*, 11 Ill. 384, Ill. 624, 637; *Stow v. Kimball*, 28 Ill. 98,

² *Goudy v. Hall*, 86 Ill. 313, 87 Ill. 107; *Grignon's Lessee v. Astor*, 43 Am. Dec. 217; *Hobson v. Ewan*, 62 U. S. (2 How.) 819, 840, 842; *Perkins v. Fairfield*, 11 Mass. 227; *McPherson*

ments and decrees of the courts, "and our titles become mere shadows;"¹ or, as said by the Lord Keeper, "you blow up with gunpowder the whole jurisdiction."² Adopt any other rule and "you deter prudent men from bidding."³ No prudent man would buy at a price approaching the value of the land if he felt that his title was to depend upon the decision of a writ of error to be brought at some distant day.⁴

It therefore follows that if a stranger to the suit purchases the property at a judicial sale, and afterward, upon appeal, the decree is reversed, the rights of such purchaser will be unaffected by such reversal, but his title to the property will remain precisely as if no appeal had been taken.⁵ In such event future litigation in the case must be over the proceeds instead of the property, and if the decree of the upper court goes to the whole merits the fund arising from the sale must be paid to the defendant.⁶ But if a party to the suit, or his attorney, becomes the purchaser no such rule applies. Such a purchaser takes the property with full knowledge that his rights therein may be defeated by a reversal of the decree under which the sale was made;⁷ but, as to a stranger, nothing can be urged against a purchaser under a decree except want of jurisdiction,⁸ but a party or his attorney takes his chances of a reversal.

X. REDEMPTION FROM SALE—MASTER'S DEED.

§ 623. Redemption from sale.—The right of redemption is a purely statutory one. Unless there is some statute to the

v. Cunliff, 11 Serg. & R. (Pa.) 422, 433, 14 Am. Dec. 642; *Voorhees v. Bank of the United States*, 10 Pet. 449, 475; *Hedges v. Mace*, 72 Ill. 472, 475; *Lambert v. Livingston*, 131 Ill. 161, 163, 23 N. E. 352; *Moore v. Neil*, 39 Ill. 256, 262, 39 Am. Dec. 303; *Mulford v. Stalzenbach*, 46 Ill. 303, 309; *Buckmaster v. Carlin*, 8 Scam. (Ill.) 104, 108; *Swiggart v. Harber*, 4 Scam. (Ill.) 364, 371, 39 Am. Dec. 418.

¹ *Feaster v. Fleming*, 56 Ill. 457, 460.

² *Windham v. Windham*, 8 Ch. Rep. 12; *M'Pherson v. Cunliff*, 11 Serg. & R. (Pa.) 422, 431, 14 Am. Dec. 642.

³ *Nichols v. Mitchell*, 70 Ill. 258, 261.

⁴ *Goudy v. Hall*, 36 Ill. 313, 320, 37 Am. Dec. 217.

⁵ *Whitman v. Fisher*, 74 Ill. 147; *Mulvey v. Gibbons*, 37 Ill. 367; *Lambert v. Livingston*, 131 Ill. 161, 23 N. E. 352; *Smith v. Brittenham*, 109 Ill. 540, 552.

⁶ *Lambert v. Livingston*, 131 Ill. 161, 163, 23 N. E. 352.

⁷ *McLagan v. Brown*, 11 Ill. 519; *Dickerman v. Burgess*, 20 Ill. 266; *Mason v. Thomas*, 24 Ill. 285; *Fergus v. Woodworth*, 44 Ill. 374; *Lambert v. Livingston*, 131 Ill. 161, 163, 23 N. E. 352.

⁸ *Hedges v. Mace*, 72 Ill. 472; *Wing v. Dodge*, 80 Ill. 564; *Hernandez v. Drake*, 81 Ill. 34.

contrary the owner's interest in the property, dependent on payment of the debt, terminates when the hammer falls. Of course he may, like any other party in interest, contest the validity of the sale on any proper ground, but if he desires to stop the proceedings by payment of the debt he must do so before the rights of an innocent bidder have intervened. In a New York case counsel contended that it was an established rule that the right of redemption remains until the purchase is consummated, the deed delivered, and the report confirmed, but cited no cases in support of the contention. Upon this Chancellor Walworth said: "If such a rule exists it is one which I never heard of before; and no such right has ever been claimed, by the owner of the mortgaged premises, in any suit or proceeding before me, during the fifteen years in which I have presided in this court."¹ As is well said by Freeman: "This right of redemption, no matter in whose behalf or for what purpose invoked, is the creature of the statute. The statute creates the right, prescribes the time and method of its exercise, and designates the persons entitled to exercise it."² As this right of redemption is one conferred by statute it exists independently of the decree, and cannot be abridged, modified or destroyed by the provisions of the latter. Any provision in the decree attempting to deprive a party of such statutory right will be treated as surplusage, "and that portion of the decree will be regarded as inoperative, and a redemption will be allowed as in other cases."³ Being a statutory right no decree of a court can take it away.⁴ Another fact may here be noted, which is this: the right being a statutory one, and one conferred for the benefit of the owner, and also for the benefit of his creditors whose claims are secured by mortgage or by judgment, cannot be waived. The supreme court of Illinois say: "Nothing is more firmly established in the law of mortgages than that it is not competent for the parties, even by express stipulation, to cut off the right of redemption."⁵

¹ *Brown v. Frost*, 3 Paige, 243, 246. *Boynton v. Pierce*, 151 Ill. 197, 208, 37

² *Freeman on Executions*, § 314. N. E. 1024.

³ *Fitch v. Wetherbee*, 110 Ill. 475, ⁵ *Bearss v. Ford*, 108 Ill. 16, 26. See
492; *Wooters v. Joseph*, 137 Ill. 113, also *Jackson v. Lynch*, 129 Ill. 72, 21
27 N. E. 80, 31 Am. St. 355. N. E. 580; *Chase v. McLellan*, 49 Me.

⁴ *D'Wolf v. Hayden*, 24 Ill. 525; 375; 2 *Jones on Mortgages*, § 1087 *et seq.*

The right, as well as all the details of procedure, are regulated by local statutes, and these statutory provisions are different in the different jurisdictions. This, together with the scope of this work and the amount of space which can be devoted to the subject, precludes anything except a few general suggestions upon the right of parties to redeem from masters' sales, and the method of making such redemptions. The right of redemption from sheriffs' sales under executions, and the right of redemption by bill in chancery, in cases where a party has the right to redeem from liens, though no sale has been made, cannot even be touched upon.

§ 624. **Redemption from sale—Continued.**—The subject of redemption from judicial sale, so far as we can here discuss it, will be examined under the following headings:

First. Who are entitled to redeem.

The parties who may exercise this right are uniformly specified by statutes, as well as the order or time within which each may exercise such right. To accomplish this they are usually divided into classes, and the time when the right of each begins, and when such right terminates, are definitely specified. Thus far there is a general uniformity in the statutes of the various states, but this similarity is far from applying to the length of time allotted to each class of persons who may exercise the right. To determine the rights of various parties in this regard it will be necessary for counsel to consult the statute in force in the jurisdiction where the right is to be exercised. It may here be stated that the rule is generally recognized that, to entitle a party to redress, he must be a party in interest; that is, he must be interested in the title as owner of the whole, or as the owner of an undivided interest, or he must be interested as a lien-holder, either by judgment, decree, mortgage, or other lien. Hence there are just two classes of persons who are entitled to redeem,—those having an interest as owners or part owners, and those interested as lien-holders.¹ This is the rule in most jurisdictions, but in Illinois, as we shall see below, it is not necessary that the judgment under which a creditor is claiming the right to redeem should be a lien upon the land sought to be redeemed.

¹ 2 Jones on Mortgages, § 1055.

All authorities, however, agree that simple creditors, whether by contract or otherwise, have no right to redeem. Their claims must be reduced to judgment to confer that right.¹ Those belonging to the first class are generally designated as "defendants," while those of the second are called "redemptioners."² Making a person of the second class a party defendant does not give him any additional right. Thus, making a judgment creditor a defendant does not, under the Illinois statute, give him the right to redeem until after the expiration of twelve months from the date of sale; in other words, he still, in fact, belongs to the second class, whose right of redemption begins at the expiration of twelve months after the date of sale and terminates at the expiration of fifteen.³ Under certain circumstances a party may belong to more than one class, and, therefore, may be entitled to redeem as a member of either. Thus, under the Illinois statute, a person may be entitled to redeem at any time during the first twelve months after the date of sale, as the holder of a junior mortgage and as a party defendant, and, as the holder of a decree for the same debt, may be entitled to redeem at any time during the next three months after the expiration of such twelve months.⁴

The parties having the right to redeem may be classified as follows:

(a) The owner of the equity of redemption,—the party whose land has been sold to pay the debt.

He is not necessarily the debtor, as he may have mortgaged his land to secure the debt of another.

(b) A grantee of the original owner of the equity of redemption, or any one deriving title under such grantee. That is, the owner of the equity of redemption at the time of the sale, whoever he may be, has the right to redeem.⁵

It is not necessary that such grantee should be a party to the suit.⁶

¹ Ewing v. Ainsworth, 53 Ill. 464.

² Freeman on Executions, § 317.

³ Wood v. Whelen, 93 Ill. 153, 171; Whitehead v. Hall, 148 Ill. 253, 257, 35 N. E. 871.

⁴ Whitehead v. Hall, 148 Ill. 253, 255, 35 N. E. 871.

⁵ Stockett v. Taylor, 3 Md. Ch. 537;

Harvey v. Spaulding, 16 Iowa, 397,

85 Am. Dec. 526; Stoddard v. Forbes,

13 Iowa, 296; Watson v. Hannum, 10

Smedes & M. 521; Hepburn v. Kerr,

9 Humph. 726, 51 Am. Dec. 685.

⁶ Ohling v. Luitjens, 32 Ill. 23; Dun-

(c) Creditors having liens by mortgage.

The general rule is that any person whose interest in the property is affected by a sale thereof has the right of redemption. Unless his interest is so affected by such sale "there is no occasion for his redeeming, and he is not allowed to do so."¹ For this reason junior mortgagees are always considered necessary parties to every suit instituted to foreclose a senior mortgage, or other prior lien,² and are universally recognized as entitled to exercise the right of redemption, which right is generally provided by statute,³ and, for the same reason, where there are several notes secured by one mortgage, the notes maturing at different times, the holder of any one of the later notes may redeem from the sale.⁴ Such junior incumbrancer has the right to redeem by paying the exact amount due under the terms of the senior mortgage.⁵

(d) Creditors having liens by judgment against the original owner of the equity of redemption, or against his grantee.

Freeman says that in nearly all the states the judgment under which redemption is made must be a lien on the property redeemed.⁶ The rule, however, is different in Illinois, as in that state, to entitle a creditor to redeem, his judgment need not be a lien on the property sought to be redeemed.⁷ In most of the states the statutes require the judgments to be a lien, while the Illinois statute is broader, the language being "any decree or judgment creditor," hence the exception to the general rule.⁸ The object of statutes allowing judgment creditors to redeem is to prevent a sacrifice of the defendant's estate, and to make it pay as many of his debts as possible;⁹ and for this reason it is the policy of the law to encourage redemptions.¹⁰

lap v. Wilson, 32 Ill. 517; Cutter v. Jones, 52 Ill. 84.

¹ 2 Jones on Mortgages, § 1055; Abadie v. Lobero, 86 Cal. 390.

² Strang v. Allen, 44 Ill. 428; Kenyon v. Shreck, 52 Ill. 382; Hodgen v. Guttery, 58 Ill. 431. See 9 Enc. Pl. & Pr. 320, 321, and cases cited.

³ 2 Jones on Mortgages, § 1064, and note.

⁴ Preston v. Hodgen, 50 Ill. 56; Handly v. Munsell, 109 Ill. 362.

⁵ Gardner v. Emerson, 40 Ill. 296.

⁶ Ex parte Lawrence, 4 Cow. 417, 15 Am. Dec. 386; People v. Easton, 2 Wend. 297; Hill v. Pixley, 63 Barb. 200; Ex parte Stevens, 4 Cow. 133; Ex parte Elwood, 1 Denio, 633; Russell v. Allen, 10 Paige, 249.

⁷ Sweezy v. Chandler, 11 Ill. 445; Karnes v. Lloyd, 53 Ill. 113.

⁸ Pease v. Ritchie, 133 Ill. 638, 646, 24 N. E. 433, 8 L. R. A. 566; Shroeder v. Bauer, 140 Ill. 135, 144, 39 N. E. 560.

⁹ Sweezy v. Chandler, 11 Ill. 445, 449.

¹⁰ Karnes v. Lloyd, 53 Ill. 113, 116;

§ 625. **Redemption from sale — Continued.**— The fact that the judgment relied upon was obtained at the last moment, by confession, for the express purpose of redeeming, constitutes no valid objection to the right of redemption on the part of the creditor seeking it, provided such judgment was based on a good consideration.¹ If there was in fact no consideration for the judgment it would be a fraudulent attempt, on the part of a stranger, to deprive the purchaser of a legal right, and it is apprehended that the fact, if it be a fact, that such pretended creditor was redeeming for the use of the principal defendant — the owner of the equity — would not relieve the act of its fraudulent character, as it would, in that event, be an effort on his part to redeem in spite of the fact that the time allowed him by law had expired. Hence the judgment relied upon should be free from fraud, taint or suspicion — an honest judgment based upon a valid consideration. A judgment collusively confessed, in a case where no indebtedness whatever exists, is fraudulent, and any party whose interest may be affected by it can properly attack it.² But in such a case no one has a right to object except the purchaser. The owner, having allowed his time for redemption to expire without availing himself of his privilege, has no further interest in the premises,³ and, therefore, cannot possibly be injured by a redemption under a fraudulent judgment. It is immaterial to him whether the property is held by the purchaser or by the redeeming creditor.⁴

The fact that the judgment creditor or mortgagee has other adequate security will not prevent him from redeeming,⁵ and a judgment creditor will not be denied the right of redemption on the ground that his judgment was scheduled in bankruptcy and the defendant discharged.⁶ An assignee of a judgment is a "judgment creditor" under the Illinois statute, and may redeem in his own name or in that of his assignor.⁷ A judgment

¹ *Boynton v. Pierce*, 151 Ill. 197, 208, 37 N. E. 1024.

² *Karnes v. Lloyd*, 52 Ill. 118.

³ *Martin v. Judd*, 60 Ill. 78, 85.

⁴ *Oldfield v. Eulert*, 148 Ill. 614, 618, 36 N. E. 615, 39 Am. St. 231.

⁵ *Fitch v. Wetherbee*, 110 Ill. 495.

⁶ *Fletcher v. Holmes*, 25 Ind. 458; *Muir v. Leitch*, 7 Barb. 841.

⁷ *Pease v. Ritchie*, 182 Ill. 638, 24 N. E. 483, 8 L. R. A. 566.

⁸ *Sweezy v. Chandler*, 11 Ill. 445; *Bozarth v. Largent*, 128 Ill. 95, 105, 21 N. E. 218.

creditor of a grantee of the original debtor is entitled to redeem as a "judgment creditor" under the Illinois statute.¹

Under the Illinois statute the parties entitled to redeem are divided into three classes, as follows:

- (a) The defendant, his heirs, administrators or assigns.
- (b) Any person interested in the premises through or under the defendant; and,
- (c) Any decree or judgment creditor, his executors, administrators or assigns.²

Second. Time within which each class may exercise the right of redemption.

Under the statutes of the various states the time within which each class of persons is entitled to redeem is definitely fixed. Under these statutes the party seeking to redeem must do so within the time limited, otherwise his right is irrevocably lost.³ Under the Illinois statute persons belonging to the first and second classes, that is, the principal defendant (the owner of the equity of redemption), and all persons interested in the premises through or under him, including the grantees and mortgagees, are limited to twelve months from the day of sale, while those of the third class (judgment creditors) are limited to three months, their time for redemption beginning at the expiration of twelve months from the day of sale, and terminating at the expiration of fifteen months from the day of sale. In computing the time in which a redemption must be made the word "month" is construed to be a calendar month,⁴ and the day of the sale is excluded;⁵ and redemption may be made at any time up to midnight of the last day.⁶ Thus, where a sale is made on the ninth day of December, the statute allowing one year for redemption, it was held that redemption might be made at any time on or before December ninth of the following year.⁷ It is needless to add that after the time for re-

¹ Shroeder v. Bauer, 140 Ill. 135, 29 N. E. 560; Lamb v. Richards, 43 Ill. 312.

² Hurd's Rev. Stat., ch. 77, §§ 18, 20.

³ Sweezy v. Chandler, 11 Ill. 445, 447.

⁴ Freeman on Executions, § 816, and cases cited.

⁵ Gross v. Fowler, 21 Cal. 392; Strong v. Birchard, 5 Conn. 361; Sny-

der v. Warren, 2 Cow. 518, 14 Am. Dec. 519; Sheets v. Selden's Lessee 2 Wall. 177, 190; Brewer v. Harris, 5 Gratt. 285.

⁶ Ex parte Bank of Monroe, 7 Hill, 177, 42 Am. Dec. 61.

⁷ Blair v. Chamblin, 39 Ill. 521, 89 Am. Dec. 322; Massey v. Westcott, 40 Ill. 160; Wilson v. Conklin, 23 Iowa,

demption has expired, the mortgagor or his grantee, or any other person who might have redeemed, may still do so with the consent of the holder of the certificate of purchase;¹ and the acceptance of the redemption money, without objection, is equivalent to express consent previously given.²

§ 626. Redemption from sale — Continued.— *Third.* How redemption is to be made.

This, like the right of redemption itself, depends upon the statute in the jurisdiction where the right is sought to be exercised, therefore the details in any particular case can only be ascertained by a careful examination of such statute; yet there are some general principles applicable in most if not all cases. A few general suggestions will be offered under the following headings:

(a) Construction to be given to redemption statutes.

A liberal construction is to be given to redemption statutes, to the end that the property of the debtor may pay as many of the debtor's liabilities as possible.³ For this reason redemption laws are looked upon with favor,⁴ and, where no injury is to follow, they should receive a liberal construction.⁵ When the time in which the debtor is allowed to redeem from a valid sale of his property has expired, he has no further right to, or interest in, the property sold,⁶ and any excess over the amount necessary to redeem must be lost to him, unless, by redemption, it is further applied in payment of his debts. To facilitate this humane purpose, as well as to protect junior mortgage, judgment and decree creditors, successive redemptions are allowed. The statute, being remedial, is to be construed liberally to effectuate the remedy and carry out its evident spirit and purpose.⁷ Yet, notwithstanding statutes of redemp-

452; Freeman on Executions, § 816, and notes.

¹ Frederick v. Ewrig, 82 Ill. 363.

² See *ante*, § 611, and *post*, § 627.

³ Whitehead v. Hall, 148 Ill. 253, 255, 35 N. E. 871; Schuck v. Gerlach, 101 Ill. 338; Boynton v. Pierce, 151 Ill. 197, 203, 37 N. E. 1024; Karnes v. Lloyd, 52 Ill. 118, 116; Sweezy v. Chandler, 11 Ill. 445, 449.

⁴ Oldfield v. Eulert, 148 Ill. 614, 618,

36 N. E. 615, 39 Am. St. 231; Schuck v. Gerlach, 101 Ill. 338.

⁵ Oldfield v. Eulert, 148 Ill. 614, 618, 36 N. E. 615, 39 Am. St. 231.

⁶ Jones v. Thompson, 26 Ill. 177; Massav v. Westcott, 40 Ill. 160; Pearson v. Pearson, 131 Ill. 464, 23 N. E. 418; Smith v. Mace, 137 Ill. 68, 26 N. E. 1092; Oldfield v. Eulert, 148 Ill. 614, 618, 36 N. E. 615, 39 Am. St. 231.

⁷ Oldfield v. Eulert, 148 Ill. 614, 618, 36 N. E. 615, 39 Am. St. 231.

tion are to be liberally construed, as the right to redeem is purely a legal one, arising from the statute, it must be exercised in conformity therewith. Parties desiring to redeem must, at their peril, bring themselves within the provisions of the statute.¹ Great strictness is required in the exercise of all these statutory privileges.²

(b) What may be redeemed.

It is not necessary to say that it is always the right of the person redeeming to redeem *all* the lands sold, whether sold *en masse* or in separate parcels, and where lands are sold in separate parcels it is always competent for him to redeem any single lot or more. In Illinois it is provided by statute that any person entitled to redeem may redeem the whole or any part of the premises in like distinct parcels or quantities in which the same are sold.³ This is the rule in the absence of any statute, and, as we have already seen,⁴ one of the reasons for requiring real estate to be sold in separate parcels is to protect this right of redemption. It is well settled that where two or more lots or tracts of land have been sold *en masse*, the redemption can only be *en masse* — there can be no redemption of a part.⁵ A purchaser of a part of the mortgaged premises stands in the shoes of his grantor and has no right to redeem his part by payment of a just proportion of the purchase price,⁶ but, by statute in Illinois, a joint owner of an undivided interest may redeem by paying his just proportion.⁷

(c) The amount required to be paid to redeem and to whom the same must be paid.

The amount necessary to be paid to effect a redemption depends upon the statutory provisions of the several states, and therefore is different in different jurisdictions. Some of the items entering into the aggregate amount required are the same in all. For example, the party making redemption is uniformly required to reimburse the purchaser by paying the

¹ *Morse v. Holland Trust Co.*, 84 Ill. App. 84, 90; *Durley v. Davis*, 69 Ill. 183; *Oldfield v. Eulert*, 148 Ill. 614, 617, 86 N. E. 615, 39 Am. St. 231. *Oliver v. Crosswell*, 42 Ill. 41; *Bozarth v. Largent*, 128 Ill. 95, 21 N. E. 218; *Oldfield v. Eulert*, 148 Ill. 614, 617, 86 N. E. 615, 39 Am. St. 231.

² *Karnes v. Lloyd*, 52 Ill. 113, 118.

³ *Hurd's Rev. Stat.*, ch. 77, § 25.

⁴ *Ante*, § 600.

⁵ *Hawkins v. Vineyard*, 14 Ill. 26;

⁶ *Meacham v. Steele*, 93 Ill. 135; *Brown v. McKay*, 151 Ill. 315, 37 N. E. 1037.

⁷ *Hurd's Rev. Stat.*, ch. 77, § 26.

actual purchase price, with interest upon the same to the date of redemption. To this is added the amount paid out by the purchaser for taxes, assessments, and, in some jurisdictions, the amount actually paid out, if any, for necessary repairs and improvements. The statute of Illinois provides that the party redeeming must pay "the sum of money for which the premises were sold or bid off, with interest thereon at the rate of six per cent. per annum from the time of such sale," and, in addition thereto, the amount paid by the holder of the certificate of sale for taxes and assessments, with interest thereon at the rate of six per cent. per annum.¹ To these items must be added, in Massachusetts, "such reasonable expenses as have been incurred in necessary repairs."² If the redeeming party is redeeming from one who, as a prior creditor, has redeemed from the purchaser, to the foregoing items must be added the amount of such redemptioner's debt, with interest and costs; but if a junior lien-holder desires to tack his own debt to the amount paid by him, so as to force a subsequent redemptioner to pay the amount of his debt also, he must be careful to redeem instead of simply taking an assignment of the certificate of sale from the purchaser, as taking such an assignment by one entitled to redeem is not a redemption, and the holder of such certificate of sale will not be permitted to use it as a certificate of redemption.³ In case the amount paid for redemption is insufficient the redemption is void,⁴ but the deficiency may be so small as render it immaterial;⁵ and though the amount paid be insufficient, yet the irregularity is cured by its acceptance, without objection, by the purchaser.⁶ In such a case the purchaser must object at the time the redemption money is tendered to him. If he accepts the amount paid without objection he is estopped from afterward complaining.⁷

To whom the redemption money must be paid is a matter which, like the amount to be paid, is dependent wholly upon local statutes, and in this regard, too, there is great lack of uni-

¹ Hurd's Rev. Stat., ch. 77, § 18.

² Freeman on Executions, § 820, citing Norton v. Babcock, 2 Met. 510.

³ Lloyd v. Karnes, 45 Ill. 62; McRoberts v. Conover, 71 Ill. 524; Moore v. Hopkins, 98 Ill. 505; Shroeder v. Bauer, 140 Ill. 135, 29 N. E. 560; Boyn-

ton v. Pierce, 151 Ill. 197, 202, 37 N. E. 1024.

⁴ Dickenson v. Gilliland, 1 Cow. 481; Hall v. Fisher, 1 Barb. Ch. 58.

⁵ Ex parte Becker, 4 Hill, 613.

⁶ Karnes v. Lloyd, 52 Ill. 113.

⁷ Id.

formity. As a general rule, however, payment is required to be made to the master or other officer who conducted the sale.¹ In some cases payment is required to be made to the clerk of the county or district court.²

The Illinois statute provides as follows: "Any defendant, his heirs, administrators, assigns, or any person interested in the premises through or under the defendant, may, within twelve months from said sale, redeem the real estate so sold by paying to the purchaser thereof, his executors, administrators, or assigns, or to the sheriff or master in chancery, or other officer who sold the same, or his successor in office, for the benefit of such purchaser, his executors, administrators or assigns, the sum of money for which the premises were sold or bid off, with interest thereon at the rate of six per centum per annum from the time of such sale, whereupon such sale and certificate shall be null and void."³

§ 627. Redemption from sale — Continued.— (d) Production of evidence of right to redeem.

When application is made to the officer by a party claiming the right to redeem, such application should be accompanied by evidence showing in what capacity the party claims the privilege, as the burden of proof rests upon him to establish his right. Such proof, however, is not required where the principal defendant — the owner of redemption — is the party seeking to redeem. In many of the states the character of proof required is provided by statute, and in such case it is not competent for the parties to waive it.⁴ The purchaser, however, may waive the production of such evidence,⁵ and will be deemed to have done so if he accepts the redemption money without objection.⁶ A purchaser is not permitted to pocket the money and then stand upon irregularities in the method of redemption. "Where money is paid to redeem and is received as redemption by the purchaser, the parties have

¹ *Karnes v. Lloyd*, 52 Ill. 118; *Iverson v. Shorter*, 9 Ala. 718.

² *Freeman on Executions*, § 318.

³ *Hurd's Rev. Stat.*, ch. 77, § 18.

⁴ *Waller v. Harris*, 20 Wend. 555, 82 Am. Dec. 590; *People v. Sheriff of Broome*, 19 Wend. 87; *People v.*

Covell, 18 Wend. 598; *Freeman on Executions*, § 319.

⁵ *People v. Fralick*, 12 Mich. 234.

⁶ *Bank of Vergennes v. Warren*, 7

Hill, 91; *Wood v. Morehouse*, 45 N. Y. 368; *Freeman on Executions*, §§ 314a, 319.

no power to give the transaction any other form or direction.”¹ Yet the officer should for his own protection, in all cases, unless the party seeking to redeem is the principal defendant, require the production of evidence of his right to redeem, which evidence, in case the applicant is a junior mortgagee, should consist of the trust deed or mortgage accompanied by the note or notes secured by the same and held by the applicant; or, in case the party seeking to redeem is not in possession of the trust deed or mortgage, he should procure and present a certified copy thereof. This is wholly unnecessary, however, where the junior mortgagee is made a party defendant in the suit in which the land is sold, and has a decree for the sale of the same property.²

The Illinois statute relative to redemptions by decree or judgment creditors has no application to cases where a decree is had by a party for the sale of specific property, as, in such a case, no execution can be had until after a sale is made and a deficiency decree entered. In case the holder of a junior mortgage is made a party defendant, and has obtained a decree directing the sale of the same property, no execution is necessary to effect a redemption, as none can be issued, but the proper method of redeeming is for the decree creditor to pay to the master the amount necessary to redeem from the sale, and then the master proceeds to sell under the second decree, such decree itself being all the process required, an execution in such case being neither necessary nor proper. The statute gives all decree creditors the right of making redemption, but designates a mode of procedure that is in part applicable to cases where the decree in equity provides that the judicial sale of specified property shall be made by the master in chancery. It would seem that in such case the requirements of the statute must be followed only so far as is practicable.³

(e) The duty of the officer in a case where redemption is made.

Upon payment to the officer of the amount which, under the law, is necessary to release the lien created by the sale, it is

¹ *Clingman v. Hopkie*, 78 Ill. 152, 157.

² *Whitehead v. Hall*, 148 Ill. 258, 85 N. E. 871.

³ *Id.* 258, 256.

evident that something must be done to evidence the fact that the debt is extinguished and the effect of the sale removed. This is usually provided for by statute. That of Illinois provides as follows: "In all cases of redemption of land from sale had under any execution, judgment, order or decree, it shall be the duty of the purchaser, sheriff, master in chancery, or other officer or person from whom said redemption takes place, to make out an instrument in writing, under his hand and seal, evidencing said redemption, which shall be recorded in the recorder's office of the proper county, in like manner as other writings affecting the title to real estate are filed and recorded, which recording shall be paid for by the party redeeming."¹ The effect of the execution and recording of this "certificate of redemption" is to extinguish the rights of the purchaser, and release the defendant's title "from the consequences of the sale, but leaving it subject to all other valid rights and liens."²

§ 628. *Redemption—Form of certificate.*—In case the owner, or other party entitled to redeem under the statute of the state of Illinois, desires so to do, the redemption certificate may be in form as follows:

Redemption Certificate.

STATE OF ILLINOIS, }
County of Cook. } ss.

I, Wm. Fenimore Cooper, master in chancery of the circuit court of Cook county, in the state of Illinois, do hereby certify that on the sixth day of January, A. D. 1903, I, as master in chancery of said court, in pursuance of a decree made and entered in said court on the sixteenth day of October, A. D. 1902, in a certain cause pending therein on the chancery side thereof, wherein James M. Parker is complainant and George W. Rogers, Maria J. Rogers, and Henry J. Robinson as trustee, are defendants, exposed for sale at public vendue the following premises, situate in the county of Cook and state of Illinois, and described as follows, to wit: Lots nine (9) and ten (10), in Ward and Moreland's Addition to Chicago, being a subdivision of the east half (E. $\frac{1}{2}$) of the northeast quarter (N. E. $\frac{1}{4}$) of section fifteen (15), township thirty-nine (39) north, range thirteen (13) east, of the third principal meridian, and, James M. Parker being the highest bidder therefor, said premises

¹ Hurd's Rev. Stat., ch. 77, § 19.

432; Bodine v. Moore, 18 N. Y. 447;

² Pfyfe v. Riley, 15 Wend. 248, 30 Boyce v. Wight, 2 Abb. N. C. 163; Am. Dec. 55; Warren v. Fish, 7 Minn. Freeman on Executions, § 821.

were struck off and sold to him, and he received a certificate of sale of said premises from me as such master in chancery bearing date January sixth, A. D. 1903, the full sum of purchase money being thirty-nine hundred and twenty-four dollars and forty cents (\$3,924.40), and the said George W. Rogers, being desirous of redeeming from said sale, has this day paid to me, as such master in chancery, the sum of forty-one hundred and fifty-nine dollars and eighty-six cents (\$4,159.86), for the purpose of such redemption, the same being the amount for which said premises were sold, with interest thereon at the rate of six per cent. per annum from the date of such sale to this time, for the benefit of the purchaser of said premises, his executors, administrators or assigns.

Given under my hand and seal this sixth day of April, A. D. 1904.

WM. FENIMORE COOPER, [SEAL.]

Master in Chancery of the Circuit Court of Cook County,
Illinois.

§ 629. Master's deed.— The power of the master to execute and deliver to the purchaser a deed of conveyance depends wholly and absolutely upon statutory provisions, or, in the absence of a statute, upon the authority vested in him by the decree of the court. The statutes of the various states usually contain special provisions upon the subject, which, of course, must be consulted. In addition to the power thus given by statute it is customary to embody the statutory provisions in the decree itself, this being done, however, merely as directory to the master, it being well understood that by so doing no additional authority is vested in the master. The statute of Illinois, here given as a sample of similar ones existing in other states, is as follows:

“When the premises mentioned in any such certificate shall not be redeemed in pursuance of law, the legal holder of such certificate shall be entitled to a deed therefor at any time within five years from the expiration of the time of redemption. The deed shall be executed by the sheriff, master in chancery or other officer who made such sale, or by his successor in office, or by some person specially appointed by the court for the purpose. . . . When such deed is not taken within the time limited by this act the certificate of purchase shall be null and void; but if such deed is wrongfully withheld by the officer whose duty it is to execute the same, or if the execution of such deed is restrained by injunction or order of a court or judge, the time during which the deed is withheld or the exe-

cution thereof restrained shall not be taken as any part of the five years within which said holder shall take a deed."¹

The master's deed executed in accordance with the provisions of the statute, or under the directions contained in the decree of the court, vests in the grantee all right, title and interest of the defendants or any of them. As to the time when the deed is to be executed by the master and delivered to the purchaser, it is unnecessary to say that, where the property is sold without the right of redemption, the deed is due as soon as the purchaser pays the purchase price and the report of the master is approved by the court, and it is equally unnecessary to add that, where the right of redemption is given by the statute or the decree of sale, the deed cannot be executed until the period of redemption has expired. If no one redeems within the time allowed the deed is due at once and should be executed and delivered by the master to the purchaser, or to his assignee, upon the presentation of the certificate of sale. In most of the states, probably, the statute provides a limit within which the deed must be made. In Illinois this period is limited to five years, and that if the deed is not taken out within the time thus limited, the certificate of purchase shall become null and void.² Under such a statute, if the party fails to take out the deed within the time named, he has no further title or interest in the premises described in the certificate, which either he or his grantee can enforce, either at law or in equity. At the expiration of the period limited, for all practical purposes, he becomes a stranger to the property, and has no more dominion over it, or power to convey it, than if he never had any interest therein,³ and afterward a court of equity has no power to compel a conveyance and the execution of the deed.⁴

It is the master's deed and it alone which invests the purchaser with title, as, neither being declared the highest bidder, the confirmation of the sale nor the master's certificate has any such effect. When a purchaser buys the land at a foreclosure sale he acquires the alternative right either to receive the

¹ Hurd's Rev. Stat., ch. 77, § 80.

Seeberger v. Weinberg, 151 Ill. 369, 380.

² Rev. Stat., ch. 77, sec. 80.

³ Rybiner v. Frank, 105 Ill. 326;
Peterson v. Emmerson, 135 Ill. 55;

⁴ Peterson v. Emmerson, 135 Ill. 55.

redemption money, in case the lands are redeemed by the mortgagor within twelve months from the date of sale, or which may be paid by any judgment creditor after the expiration of twelve months and before the expiration of fifteen months; or, in case no such redemption should be made either by the owners of the equity of redemption, or by any judgment creditor, then he has a right to the master's deed. But, by his purchase at the master's sale, he acquires no title to the land, either legal or equitable.¹ The deed must be made, as the statute provides, by the officer making the sale, his successor in office, or by some one appointed by the court, though it has been held that a deed made by a master after he goes out of office is good as color of title, though not otherwise operative.² As to who is entitled to a deed the statute makes the certificate of purchase assignable, and then further provides that "the legal holder" shall be entitled to a deed on its presentation to the master. A misrecital of the term of court at which the decree of sale was rendered in no way impairs the validity of the deed, and affords no ground for a vacation of the sale.³

§ 630. **Master's deed — Form of.**—As above stated, the party entitled to the deed obtains it from the master upon presentation of the certificate of sale. Such deed may be in the following form:

Master's Deed.

This indenture, made this — day of —, A. D. 19—, between Wm. Fenimore Cooper, master in chancery of the circuit court of Cook county, in the state of Illinois, party of the first part, and — —, of —, county of —, and state of —, party of the second part, witnesseth:

Whereas, in pursuance of a decree entered on the — day of —, A. D. —, by the circuit court of said Cook county, in a certain case, then pending therein, on the chancery side thereof, wherein — —, complainant, and — —, defendant, the said master in chancery duly advertised, according to law, the premises hereinafter described, for sale at public auction, to the highest and best bidder for cash, at the hour of

¹ *Strauss v. Tuckhorn*, 200 Ill. 75, 81;
Phillips v. Demoss, 14 Ill. 410; *Karnes*
v. Lloyd, 53 Ill. 113; *Martin v. Judd*,
 60 Ill. 78; *Arnold v. Gifford*, 62 Ill. 249.

² *Williams v. Council*, 49 N. C. (4
Jones), 206.

³ *Watt v. McGalliard*, 67 Ill. 513.

— o'clock, in the — noon on the — day of —, A. D. —, at the judicial salesrooms of the Chicago Real Estate Board, on the ground floor of No. 57 Dearborn street, in the city of Chicago, in said Cook county:

And, whereas, at the time and place so as aforesaid appointed for said sale, the said master in chancery attended to make the same, and offered and exposed said premises for sale at public auction, to the highest and best bidder for cash, and thereupon — offered and bid therefor the sum of — dollars (\$—), and that being the highest and best bid offered, said master in chancery accordingly struck off and sold to said — for said sum of money, the said premises, and did thereupon sign, seal and deliver to said — the usual master's certificate therefor:

And, whereas, said premises have not been redeemed from said sale:

Now, therefore, in consideration of the premises, the said party of the first part doth hereby convey unto the said party of the second part, — heirs and assigns, the said premises, which are situated in the county of Cook and state of Illinois, and are described as follows, to wit: —.

To have and to hold the same, with all the appurtenances thereunto belonging, unto the said party of the second part, — heirs and assigns, forever.

Witness the hand and seal of the said party of the first part, the day and year first above written.

WM. FENIMORE COOPER, [SEAL]

Master in Chancery of the Circuit Court, Cook County, Ill.

STATE OF ILLINOIS, }
County of Cook. } ss

I, —, a notary public in and for the said Cook county, in the state aforesaid, do hereby certify that Wm. Fenimore Cooper, master in chancery of said circuit court of Cook county, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act, as such master in chancery, for the uses and purposes therein set forth.

Given under my hand and notarial seal, this — day of —, A. D. 19—.

—, Notary Public.

§ 631. Master's deed — Final report approving.— The execution and delivery of the deed completes the master's duty, unless the statute or decree of court provides for a supplementary report, though such report is sometimes made and

approved by the court. But such report and its approval are wholly unnecessary unless so required, and if such report is made it is wholly immaterial whether it is approved or not.¹ In case such a report is necessary or advisable its form may be as follows:

Report of Execution of Deed.

STATE OF ILLINOIS,	}	ss.	Circuit Court of Cook County.
County of Cook.			To the March Term thereof, A. D. 1904.

James M. Parker	}	
v.		
George W. Rogers,		Gen. No. 204,624.
Maria J. Rogers and		Term No. 7,296.
Henry S. Robinson,	}	Foreclosure.
Trustee.		

To the Honorable Judges of said Court, in Chancery sitting:

In pursuance of a decree of sale entered in above entitled cause, on the 16th day of October, A. D. 1902, I, Wm. Fenimore Cooper, a master in chancery of said court, respectfully report that, in obedience to the directions in said order contained, did, as heretofore reported by me to this honorable court, on the 6th day of January, A. D. 1903, sell at public auction to James M. Parker, complainant in said cause, for the sum of thirty-nine hundred and twenty-four dollars and forty cents (\$3,924.40), he being then and there the highest and best bidder, the following lands described in said decree, to wit: Lots nine (9) and ten (10), in Ward & Moreland's Addition to Chicago, being a subdivision of the east half (E. $\frac{1}{2}$) of the northeast quarter (N. E. $\frac{1}{4}$) of section fifteen (15), township thirty-nine (39) north, range thirteen (13) east, of the third principal meridian, in the county of Cook and state of Illinois.

And I further report that, in obedience to the directions in said decree contained, and in pursuance of the statute in such case made and provided, I did, on the said 6th day of January, A. D. 1903, execute and deliver to the said James M. Parker a certificate of sale, certifying therein, among other things, the time when the period of redemption as to the defendants, and also as to the creditors of the principal defendant, would expire, and afterward, to wit, on the 10th day of April, A. D. 1904, the said premises not having been redeemed according to law, one George W. Jones, as assignee of said James M. Parker, presented said certificate of sale to me, the same being theretofore duly assigned to him by indorsement

¹ *McHanv v. Schenk*, 88 Ill. 857, 863.

thereon, under the hand of said James M. Parker, and then and there requested me to execute and deliver to him, as such assignee, a deed to the premises aforesaid.

And I further report that, in obedience to the directions in said decree contained, and in pursuance of the provisions of the statute in such case made and provided, I did, to wit, on the said 10th day of April, A. D. 1904, execute and deliver to said George W. Jones, a master's deed, under my hand and seal, and duly acknowledged, then and thereby vesting in the said George W. Jones all the right, title and interest of the defendants, or either of them, in and to the premises aforesaid.

All of which is respectfully submitted.

Dated this the 20th day of April, A. D. 1904.

WM. FENIMORE COOPER,
Master in Chancery of the Circuit Court, Cook County, Illinois.

CHAPTER X.

MASTER'S FEES AND OTHER COSTS.

I. GENERAL PRINCIPLES.....	§§ 632-633
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I. GENERAL PRINCIPLES.

§ 632. How masters are to be paid — Not a new problem.— The question of compensation of masters in chancery for services and the best way to provide for payment of same so as to insure faithful performance of duties, and at the same time prevent the question of fees from having any influence upon their decisions, is not a new one. In a paper written by George Norburie, about the end of the reign of James I., is found the following statement upon this subject:

“I do remember, that in the first parliament after the happy entrance of our king into this his kingdom, nothing was more complained of, or more troublesome to the house, than the fees at that time taken by the masters of the chancery; which, tho' the said masters did not exact of the clyents as a duty, but took what they freely and voluntarily gave them, yet was it held a grievance to the commonwealth not to be endured. And thereupon, 1 Jac. I. an act was made, that no man to whom any cause was referred out of any of his Majesty's courts of justice should, under a great penalty, take any thing for his report or certificate, directly or indirectly. But in that parliament or sithence no course was to take them away, or to have their number lessened. They took away the effect, but not the cause.

“And what was the sequel? Verily the parliament was no sooner ended, but, the business of the references continuing as amply as ever, the clients for their dispatch were enforced to

give, and the masters (whose laboures were still used) were adventurers by the client for that which he voluntarily gave them, and by which he received benefit; and soe they continued in the same course of taking, till Sir Edward Phillips came to be master of the rolls, who so handled the matter, that references were *e medio sublatæ*. Insomuch as I have heard, the lord chancellor himself (with whom before that time it was usual to referr causes) upon a motion made unto him that a cause might be referred, gave them up for lost, saying, references are now taken away; and soe directed another course in the business."¹

In the preface to Bennet's Masters in Chancery, published in 1842, we find this matter touched upon as follows: "Another subject has been lately mooted, the remuneration proper to be made to a master in chancery. This is much too tender ground for me to tread; I only name it for the purpose of alluding, as a matter of history, to the fact, that the same principle which, by the bill lately introduced into parliament, was intended to be adopted to remunerate the masters, partly by fees of office, and partly by a permanent salary, was insisted upon two centuries and a half ago, as the proper ground upon which such remuneration should proceed."

There are three different methods of providing for master's fees in cases of references:

First. By a statutory provision fixing a specific sum for each item of service rendered.

Second. By a statute providing a regular salary for the master.

Third. By a statute or rule of court fixing the amount to be charged for certain services, such as issuing subpoenas, swearing witnesses and the like, and leaving all others to be determined by the master, subject to revision by the court, upon complaint of any party who may feel himself aggrieved thereby. Under the practice generally followed the latter course is pursued, the master fixing the amount of his own compensation for the most of his services, especially for the most important, such as making his report, subject, as above stated, to revision by the court on complaint of the party who feels that the

¹ Hargrave's Law Tracts, pp. 428, 429.

amount charged is unreasonable. There are three important objections to this practice:

First. A lack of uniformity in charges. One master of the same court will charge and collect \$500 for services in which, perhaps, another will charge and receive only a fifth part as much.

Second. Exorbitant charges are frequently made and the client forced to pay the same, the supervising power of the court proving practically inadequate to secure protection for suitors. The solicitor who succeeds, after a hot contest, in securing a favorable report from the master hesitates to make war upon the latter by contesting the charges made for services. This disinclination is heightened by the reflection that the master is a permanent officer of the court before whom counsel must appear in future causes, and hence one whom counsel can illly afford to antagonize.

Third. The improper influence which this power may exercise upon the master in making his findings. The fact that a well-to-do suitor can pay and doubtless will pay an amount as compensation to the master who makes a finding in his favor, which a poor litigant could not or would not pay, it is feared sometimes enters into the question and has its bearing upon the mind of the master. What would be thought of a rule making the compensation of the judge of the court depend on the amount which he might think proper to collect from the successful suitor, the only safeguard against exorbitant charges being an appeal to a higher court? Yet this is the precise course that is generally pursued in the master's office.

The remedy for these evils would be to fix a regular scale of fees for each act of the master, so much for each subpoena, notice, order, so much for each day taking testimony, listening to argument of counsel, making up report, filing objections to report, hearing of same; in short, a regular fee for every official act rendered under an order of reference. The statute should require him to collect these fees promptly, and at stated periods, say quarterly or semi-annually, make a sworn report of the same to the court, and, upon its approval, turn the aggregate amount over to the county treasurer, taking his voucher therefor. The compensation for the services of the master should be a *salary*, just as the judge of the court is paid, and

no part of it to be paid out of or contingent upon his collection of fees. This would secure uniformity of charges made by the various masters, prevent exorbitant fees from being exacted in any given case, and prevent the possibility of the question of fees ever influencing him in the discharge of his official duties. In view of the difficulties connected with the prevailing practice one is tempted to sigh for the good old times when the masters in chancery were members of the king's household, ate at the king's table, and, in addition to a regular salary, received as perquisites their "robes," "bote-hire," "horse meate" and "puncheons of wine!"¹

§ 633. **Obligations on part of counsel, master and the court.**— Whatever plan is adopted for compensating the master for his services he should faithfully discharge every duty devolved upon him, whether by statute, the rules of the court or by the order of reference under which he is acting, and then the court should see, if it is in its power, that he is liberally remunerated for his labor. To this end he should be personally present and personally discharge every official duty imposed upon him. Of course there are some duties required of him which may be performed by another. For example, he may employ, as we have already seen, an auctioneer when making a sale under an order of court, yet, even in such cases, the law requires his presence and personal supervision of the act. So, also, he may employ another to perform the mere clerical duties of his office, and such clerical duties may be performed by his clerk even in the absence of the master, but as to all acts requiring the exercise of official discretion or judgment they must be performed by the master and by him alone. For example, upon a reference the witnesses must be sworn by the master, and must not only be sworn by him but must be examined in his presence and hearing. Reference has already been made to the pernicious practice often indulged in, of swearing the witnesses and allowing the examination to proceed in the absence of the master, the latter retiring from the room and engaging in the performance of other duties; and we there saw that such a practice is condemned by the courts and will not be tolerated by them when brought to

¹ *Ante*, § 28.

their knowledge.¹ This duty the court expects the master to discharge, and he has no more right to shirk responsibility in this regard than he has to turn the whole reference over to a justice of the peace, and allow the latter to discharge every duty under it except that of attaching the master's signature to the report. If any duty devolving upon the master under an order of reference and presumed to have been performed by him was not in fact performed, common honesty requires that it should be excluded from the master's charge for services. It is highly improper for attorneys to agree with a master that his compensation, in advance of an order of reference, shall not exceed a given sum. Courts will not regard such an arrangement made in advance of the appointment of the master. "It is not to be tolerated that parties may hawk such employment about the street, and award it to the lowest bidder." Yet, after "his services have been performed, it would, of course, be agreeable to the court, and relieve it of responsibility, if the parties interested could agree with the master upon an amount of compensation satisfactory to both. But in advance of the appointment such agreements are improper, and in disrespect of the court."² All contracts or agreements between the master and attorneys, or between the master and parties, by which it is sought to obtain business, are highly improper and will be rebuked by the court if brought to its knowledge. References must come to the master direct from the court and not through dickerings or bargainings with parties or their counsel. The master should never agree in advance that, provided a reference is made to him in a given case, he will charge only a specified sum for his services. Especially will the court condemn anything like a canvass of its masters to see who will do the work for the least money, thus practically letting a reference out to the lowest bidder.³ So, too, any agreements on the part of the master to divide his fees with counsel in case references are made to him are still more reprehensible, and are sure to bring to all parties concerned the punishment deserved if brought to the knowledge of the court.⁴ The master should wait for the reference to come to him in the regular way, discharge his

¹ *Ante*, § 132.

³ *Ante*, § 132.

² *Finance Co. v. Warren*, 53 U. S. App. 472, 82 Fed. 525.

⁴ *Ante*, § 132.

duty faithfully and honestly, and then charge a fair and reasonable sum for his services with the assurance that his conduct will be approved by the court. The master is but a ministerial officer of the court and, as such, is subject to the control and authority of the court. Hence it is the duty of the court to see that every obligation imposed upon him by its orders is faithfully and honestly performed, and that he is fairly and rightfully compensated for his services. As to all services rendered by the master where a fixed compensation is allowed by statute there is no room for controversy, the aggregate amount resting simply in computation. For this reason this chapter is devoted, in the main, to the discussion of the subject of masters' fees, and other costs, where the amount is left to the discretion of the master, subject to revision by the court in case of dissatisfaction.

II. MASTER'S COMPENSATION — OF WHOM, WHEN AND HOW COLLECTIBLE.

§ 634. **Services required of the master upon a general reference.**—The services required of the master, and for which he is entitled to compensation, vary, of course, in different cases, depending upon the nature of the matters submitted and the duties enjoined upon him by the order of reference. The matter submitted may be as to a single fact to be investigated and the result reported to the court, such as the sufficiency of an answer, upon exceptions taken to it, or it may be to ascertain and report the facts as to all the issues involved, together with the master's conclusions of law, thus making it his duty to cause the witnesses to appear before him, hear their testimony, as well as all other competent evidence offered, determine what facts are established thereby, determine the law applicable to such a state of facts, and finally, report his conclusions, both of fact and of law, to the court, together with his recommendation as to the decree which should be entered, in other words, the remedy which the law applies to such a state of facts, thus devolving upon the master, practically, the trial of the whole cause. Under a reference of this character the services of the master, a part of all of

which he may be required to perform, may be enumerated as follows:

First. Preliminary services.

(a) Procuring the files and a copy of the order of reference.

(b) Examination of the pleadings and order of reference for the purpose of determining the issues submitted and what services are required to be performed.¹

(c) Fixing a day for a preliminary meeting in the master's office, and giving notice of same.

Second. Preliminary meeting in the master's office.

(a) Hearing statement of counsel of the respective parties as to the real matters to be litigated, what is admitted and what contested.²

(b) In case of an accounting, ruling the parties to bring in their respective accounts in "the form of debtor and creditor," in compliance with the rules of court.³

(c) Reducing admissions of parties to writing and requiring the same to be signed by counsel.⁴

(d) Setting cause down for hearing and giving notice thereof.⁵

(e) Issuing subpoenas for witnesses, and, when required so to do, entering order for the production of books, papers and documents to be used as evidence on the hearing.⁶

(f) Hearing any preliminary motions, listening to argument of counsel for and against the same, and examination of authorities submitted.

Third. The hearing.

(a) Listening to opening statements of counsel of the respective parties.

(b) Administering oaths to the witnesses.

(c) Taking the testimony, noting objections to evidence, listening to argument of counsel *pro* and *con*, the examination of authorities submitted, rulings upon such objections, and noting exceptions of counsel when required so to do.⁷

(d) Adjournments from time to time, as the case may require.⁸

¹ *Ante*, §§ 159, 160, 164-166, 174, 175.

² *Ante*, §§ 182, 183.

³ *Ante*, §§ 295-297.

⁴ *Ante*, § 176.

⁵ *Ante*, §§ 179, 181, 186-194.

⁶ *Ante*, 196, 197, 198-210.

⁷ *Ante*, §§ 214 *et seq.*, 278-290.

⁸ *Ante*, § 275.

- (e) Motions to close proof.
 - (f) Rule to close proofs and giving notice thereof.¹
 - (g) Motion to re-open proof to enable party to introduce further evidence.²
 - (h) Motions to strike out certain portions of testimony.
 - (i) The preparation of special reports or certificates, upon request of counsel, upon the rulings of the master as to the admission or rejection of testimony, and other proceedings in the master's office, where the opinion of the chancellor is desired as to the correctness thereof.³
 - (j) Setting the cause down for argument.
- Fourth.* The argument.
- (a) Hearing the argument of counsel, noting points made and authorities submitted in support thereof.⁴
- Fifth.* Forming conclusions of fact and of law.
- (a) Reading the evidence, and when necessary making abstract of same.⁵
 - (b) A careful examination of the briefs and arguments of counsel, including an examination and consideration of the authorities cited.⁶
 - (c) The search for, examination and consideration of other authorities bearing upon the issues involved, arriving at conclusions of fact and of law.
 - (d) Formulating findings of fact and of law, including the preparation of the draft report, in jurisdictions where a draft report is prepared and submitted to counsel.⁷
 - (e) Fixing limit for filing objections to draft report and giving notice of same.⁸
 - (f) Motion to re-open report for the purpose of introducing further testimony, and ruling upon the same.⁹
 - (g) Consideration of objections to draft report and passing upon the same.¹⁰
 - (h) Preparation of final report.¹¹
 - (i) Filing final report.¹²

¹ *Ante*, § 217.² *Ante*, § 276.³ *Ante*, §§ 320-322.⁴ *Ante*, § 312.⁵ *Ante*, § 341 *et seq.*⁶ *Ante*, § 359 *et seq.*⁷ *Ante*, §§ 362-364.⁸ *Ante*, § 386.⁹ *Ante*, § 276.¹⁰ *Ante*, §§ 388, 389.¹¹ *Ante*, § 390 *et seq.*¹² *Ante*, §§ 419-421.

The foregoing list of services which may be rendered by the master, and for which he has a right to insist upon compensation, is necessarily only a partial one, as it is impossible to enumerate all of the services which may be required of the master during the progress of a hearing; for example, upon a motion to open up the report to admit further evidence, he may sustain such motion, the effect of which may be such as to require a large part of the previous work to be done over again, as well as the performance of additional services, or, during the progress of a hearing, on appeal from his rulings, the order of the court may be such as to require a large amount of additional labor on the part of the master. In various other ways additional services may be required of him; for example, parties ordered to produce books may refuse to comply with the order, or parties or witnesses may stand in defiance of any other lawful order of the master, and thus necessitate proceedings for contempt;¹ or the order of reference may be so uncertain or ambiguous as to necessitate an application to the court for further directions, and this, too, after the hearing has commenced,² and, it may be, such "further directions" will impose additional duties upon the master. The foregoing list, therefore, is only given as a sample of what may be required of him, and for which duties, when discharged, he may rightfully claim compensation.

§ 635. Compensation of master may be fixed or limited by statute or by rule of court.—In some jurisdictions the amount to be allowed a master or referee is regulated by statute, while in others the same end is sought to be obtained by a rule of court. Thus, in Georgia it is provided by the Code, section 4602, that for reporting evidence an amount not exceeding fifteen cents a hundred words shall be allowed the master, but in no case to exceed \$500 for reporting such evidence. And further, that for reporting his findings, rulings, proceedings and conclusions, in cases involving less than \$1,000, an amount not to exceed \$50, and in cases involving more than \$1,000 and less than \$5,000, not more than one and one-half per cent. on the excess over \$1,000 in addition to the fee above named; and in all cases involving more than \$5,000

¹ *Ante*, §§ 330-335.

² *Ante*, § 153.

the fees above named, and not more than one per cent. on the excess above \$5,000, but in no case shall the total fees for all services rendered exceed \$1,000. It is further provided by the Code, section 4603, that "it shall be lawful for the court, with the consent of the parties, to fix the fees of the auditor in advance, and incorporate the same in the order making the appointment."

In Alabama the Code, section 1373, provides a specific, definite fee for almost every official act to be performed by the register, and among others, the following fees are provided for executing a reference and making his report:

Taking account, swearing witnesses and performing other services on reference, for each day engaged thereon (but in no case to exceed five days' pay, unless by special order of the court).....	\$3 00
For taking testimony on reference or in proceedings relating to trustees and receivers, for every hundred words	15
For each report of five hundred words or less.....	2 50
For every hundred words over five hundred.....	15
But when the amount claimed is less than five hundred dollars, and the register is not required to pass upon any disputed item of indebtedness, payment or credit, his fee for executing the reference and making report thereon is only.....	2 00

Statutory provisions fixing or limiting the fees of masters, or those discharging the duties of a master, will be found to exist in other states, but want of space limits me to only one additional example. A similar statute in Illinois provides that a master shall be allowed fifteen cents per hundred words for taking and reporting testimony upon a reference, and in counties of the first and second class for examining questions of law and fact and reporting his conclusions thereon "a sum not exceeding \$10.00." "In counties of the third class, masters in chancery may receive for examining questions in issue referred to them, and reporting conclusions thereon, such compensation as the court may deem just."¹ In that state in counties of the first and second class, and in all other jurisdictions where the

¹ McDonald v. Patterson Co., 84 Ill. App. 326, 360; Lee, Adm'r, v. Rowley, 4 Ill. App. 218; Harvey v. Harvey, 87 Ill. 54.

amount to be allowed the master for his services is limited by statute, it is error to allow a greater sum.¹ As the only authority for taxing fees by a master in chancery is the statute, no other or greater fee can be charged than the statute provides,² and the statute must be strictly construed.³ For this reason it is submitted that this Illinois statute, as well as all similar ones, may work great injustice in particular cases. Cases may arise in counties of the first and second class involving hundreds of thousands of dollars, and which require months of labor on the part of the master, and in which the master may actually earn a hundred times more than the court is permitted to allow him, yet the hands of the court are tied. No justifiable reason can be given why a master in one part of the state should be paid any less, or more, as the case may be, than is paid to another, for the same services, performed in a different part of the state. Where the amount of a master's compensation is fixed by statute, no shift or device will be permitted for the purpose of evading the force of the statute. For example, the fees allowed a master commissioner, under the Kentucky statute, § 1740, for making a sale, include all the services rendered by him in and about the making of such sale, and he will not be permitted to receive a greater amount by charging for extra services, such as advertising the property, reporting the sale, receiving and paying out the money, or necessary attendance upon the court. To allow the master extra compensation for such services would be doing indirectly what the statute prohibits being done directly.⁴ The same object is sometimes sought to be attained by a rule of court. Thus, in New Jersey it is provided by Chancery Rule No. 47 that the master shall be entitled to \$4.00 for making of the report, thirty cents per folio for drawing of same, and ten cents per folio for all schedules annexed thereto, except in divorce cases, where his fees shall not exceed \$4.50. There is a marked difference, however, between a statutory limitation and a lim-

¹ Harvey v. Harvey, 87 Ill. 54; Lee v. Rowley, 4 Ill. App. 218.

² Smith v. McLaughlin, 77 Ill. 596; Rickert v. Suddard, 184 Ill. 149, 158, 56 N. E. 844; Schnadt v. Davis, 185 Ill. 476, 484, 57 N. E. 652.

³ Schnadt v. Davis, 185 Ill. 476, 484, 57 N. E. 652.

⁴ Wathen v. England, 102 Ky. 537, 44 S. W. 92.

itation made by a rule of court, in this: the former, as above stated, is absolutely binding upon the court, and, therefore, may work injustice in particular cases, but no such result follows where the limitation is not by statute but by a rule of court. Under such a limitation, in all ordinary cases, of no peculiar or special difficulty, and involving no extraordinary labor, the master should be allowed no greater compensation than that fixed by the rule; but cases of peculiar importance and difficulty sometimes come before the master or referee, in which the compensation allowed under the rule would be wholly inadequate, and such special cases ought to be made exceptions to the general rule on the subject.¹ The principle is this: the power to make a rule includes the power to suspend its force or effect in any particular case where justice requires it,² while no such power exists to suspend the force or effect of a statute.

§ 636. **Fixing master's compensation.**—The general rule that, except as to purely ministerial duties, such as swearing the witnesses, reducing the testimony to writing and like services, the whole question as to the master's compensation upon a reference is left, in the first instance, to the master, his action, in case of dissatisfaction, being subject to revision by the court. The Illinois statute fixing fees and salaries allows to masters in chancery in Cook county, for taking and reporting testimony under order of court, for every one hundred words, fifteen cents, and in addition, for examining questions in issue and reporting conclusions thereon, such compensation as the court may deem just, and the clerk of the court has no power to tax up such compensation, but it is the duty of the chancellor, in case of contest, to fix such compensation.³ Under this statute, in counties of the third class, the practice is the same as in the federal courts under Equity Rule No. 82, which is as follows: "The compensation to be allowed to every master in chancery for his services in any particular case shall be fixed by the circuit court, in its discretion, having regard to all the

¹ *Doughty v. West, Bradley & Cary Mfg. Co.*, 8 Blatch. (U. S. Cir. Ct. S. D. N. Y.) 107, Fed. Cas. 4,030. 153, 56 N. E. 344; *Schnadt v. Davis*, 185 Ill. 476, 483, 57 N. E. 652; *Nutrient Co. v. Green Lumber Co.*, 193 Ill. 324, 63 N. E. 152.

² *Ante*, § 170.

³ *Rickert v. Suddard*, 184 Ill. 149,

circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but, when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.”¹

In jurisdictions where the practice is governed by such a statute or rule of court, the usual course pursued is for the master to fix upon such a lump sum as will, in his judgment, be right and proper under all the circumstances, and note it at the foot of his report. This “statement of costs,” appended to the master’s report below his signature, is “but a guide to the clerk in making up his fee bill.” It is not within the reference, is no part of the report proper, and the court in approving the report is not to be presumed to have passed upon it, but, when the fee bill is made up, including such statement, it is competent for any party interested to question its validity by a proper proceeding.² The only method of questioning the propriety of a master’s charge for services, or of enforcing payment where the collection thereof is resisted, is by an appropriate motion made in the cause in which the master was appointed. The question must not only be brought before the court by a proper motion, but such motion must be made by a party sought to be charged with the same, who contends that he is not liable at all, or that the amount charged is excessive; or it must be by the master, the collection of whose charge for services is contested on the ground of non-liability, or on the ground that the amount claimed is excessive. In Illinois the practice is thus stated by the appellate court: If a party deems the sum demanded by the master for his services to be excessive and desires to contest the matter, he should enter a motion asking the court by an order to fix the amount of his compensation. When such order is made the party may tender the amount so fixed to the master, after which the court may compel the return of the evidence, or evidence and report, as

¹ Rule as amended April 16, 1894, 152 U. S. 709; 3 Desty’s Fed. Proc., p. 1800.

² Brown v. Mortgage Co., 110 Ill. 235, 240; Rimmer v. O’Brien-Green Co., 64 Ill. App. 104, 107.

the case may be. Unless the lower court is thus required to fix the compensation of the master for services, the upper court is precluded from passing on the question as to whether the amount charged or ordered to be paid to the master is excessive or not.¹

This remedy by motion is not the only proper remedy, but is, for obvious reasons, the exclusive one. In Pennsylvania it is held that the compensation of the master, as respects the party who has it to pay, is cost and not a fee.² In the case referred to it is said: "When a party in a litigated case is adjudged to pay costs, his liability is not restricted to the disbursements and expenses which the opposite party may be entitled to receive, but extends to the officers of the court for services rendered therein. When these united sums are taxable in the case they constitute 'the costs' for which he is liable. In one gross sum he pays both. As against the party compelled to pay them, all the items are costs." As an item of expenses in an equity case, the master's fee is included in the general cost of the suit.³ In the same state an action of assumpsit was brought by a master in chancery against the complainant in a bill to recover his fee as master, fixed by the court after his report was made. Affidavit of defense was filed averring that the master had presented his petition to the court in equity for an order for payment of his fee and that no order was yet entered. Upon this state of facts it was held that the fee of the master, "as well as other costs in equity, are within the discretion of the court wherein the suit is brought, and that court has the power, not only to fix the costs, but to make any necessary and proper order for their payment;" and it was further held that "it would be an anomalous proceeding for a court of law to take up a matter where the court of equity had left it," and that the latter court was "fully competent to attend to its own business."⁴

§ 637. Fixing master's compensation — Continued — Form of motion.— If a party from whom the master's compensation is demanded deems the amount claimed to be excessive and

¹ *Rimmer v. O'Brien-Green Co.*, 64 Ill. App. 104, 107; *Brown v. Mortgage Co.*, 110 Ill. 235. See Rev. Stat. Ill., ch. 53, § 20.

² *Janes' Appeal*, 87 Pa. St. 428.

³ *Bradley v. Railway*, 160 Pa. St. 72, 28 Atl. 500, 14 Am. & Eng. Ency. of Law, 955.

⁴ *Woodward v. Brace*, 139 Pa. St. 316, 20 Atl. 1001.

unreasonable, his remedy is to move the court to review the action of the master, and, by its order, to fix such compensation at such sum as shall be right and proper. Such motion may be in form as follows:

Motion by Party for an Order Fixing Master's Compensation.

STATE OF ILLINOIS, County of Cook.	} ss.	In the Circuit Court of Cook County. Of the September Term thereof, A. D. 1903.

First National Bank of Chicago v. John A. Morton.	} Gen. No. 196,864. Term No. 7,953. In Chancery.

And now comes the defendant, John A. Morton, by his solicitor, Henry M. Baker, and moves the court to determine and assess the amount of compensation due and payable to George Mills Rogers, as master in chancery, for his services in said cause as such master in chancery, under an order of reference entered in said cause on the 4th day of June, A. D. 1903; and for grounds of said motion respectfully shows unto the court:

First. That on the 4th day of June aforesaid an order was duly entered in said cause by which the same was referred to the said George Mills Rogers, as master in chancery, to take the evidence and report his conclusions thereon of both law and fact to the court.

Second. That afterward, to wit, on the 12th day of June, A. D. 1903, the said cause came on for hearing before said master, and on said day, and on divers days thereafter, the said master proceeded to render services under such order of reference, and thereafter made and filed his report therein.

Third. That in said report the said master finds, etc. [*Here state briefly the master's findings.*]

Fourth. That for the services so rendered by him as such master in chancery the said George Mills Rogers now insists and claims this defendant is liable, and has charged and demanded of this defendant therefor the sum of \$350, which sum this defendant now insists is excessive and unreasonable, and now moves the court to, by a proper order, fix said master's compensation for his services at such sum as the court shall deem reasonable and proper.

HENRY M. BAKER,
Solicitor for Defendant.

In case the amount claimed by the master is deemed excessive, and for that, or any other reason, the party charged with

the payment refuses payment, the remedy of the master is also, by motion, varied to suit the circumstances of the particular case, which motion may be in form as follows:

Motion by Master for an Order Fixing Amount of His Compensation.

In the Circuit Court of the United States for Southern District of Illinois.

Henry W. Putnam and the Finance Company of Pennsylvania	} Gen. No. 7,996.
v.	
Jacksonville, Louisville and St. Louis Railway Company.	} In Equity.

Now comes P. B. Warren, special master in chancery in the above entitled cause, and moves the court to determine and assess the amount of compensation due him for services rendered in the above entitled cause as such special master in chancery, and to enter an order therein directing the purchasers of the property of the said defendant railway company to pay to said P. B. Warren the amount of compensation so determined and assessed, and that in default of such payment that such order and decree be a first and subsisting lien on all the property of said defendant railway company so purchased by said purchasers aforesaid; and for grounds of said motion respectfully represents unto the court:

First. That on the 23d day of April, 1896, by a decree duly entered in the above entitled cause, it was, among other things, ordered that the said defendant railway company should, on or before the expiration of five (5) days from the date of this decree, pay into this court to the credit of this suit a certain large sum of money, and that in default thereof all the property, premises and franchises of said railway company as set out in said decree should be sold as therein directed.

Second. That among other things it was provided in said decree of April 23, 1896, that P. B. Warren be and he was thereby appointed special master, to make, direct and conduct the said sale of the said property aforesaid; and that upon default of the said defendant railway company to make the payment provided in said decree, the said P. B. Warren did proceed to execute the directions of the court as to the sale of said property so expressed in said decree, and pursuant thereto did on the 10th day of June, 1896, sell the said property to Robert F. Kennedy and J. H. Dunn, all of which more fully appears in the reports of said special master in chancery filed in this cause on the 11th day of June, 1896, reference thereto being here made for greater certainty.

Third. That subsequent thereto and on the 13th day of June, 1896, an order was duly entered in this cause approving the report of said special master in chancery and the sale of said property, confirming the sale and directing said special master to execute a deed conveying said property to said purchasers; and that thereupon, at the request of said purchasers, said P. B. Warren did, on the 29th day of June, 1896, execute his deed as said special master, wherein and whereby he conveyed to the said purchasers the property aforesaid.

Fourth. Thereafter on the said 29th day of June, 1896, Henry A. Gardner, Esquire, solicitor for said purchasers, expressed to the said P. B. Warren his intention on behalf of said purchasers to fully compensate him at an early date for the services so rendered as said special master in chancery; but notwithstanding said P. B. Warren's right to such compensation and the declaration of said purchasers through their solicitor, and notwithstanding the fact that said purchasers did, on the 1st day of July, enter into full possession of said property and have ever since enjoyed the same, they, the said purchasers, have wholly failed and neglected to compensate the said P. B. Warren for the services so rendered aforesaid; and the petitioner avers that such services are reasonably worth the sum of five thousand dollars, and prays a decree for such amount.

P. B. WARREN,

Special Master in Chancery.

UNITED STATES OF AMERICA, }
So. Dist. of Illinois, } ss.

P. B. Warren, being first duly sworn, deposes and says that he is the petitioner in the foregoing petition; that he has read the same and knows the contents thereof; that the same is true in substance and fact.

P. B. WARREN.

Subscribed and sworn to before me this 15th day of September, 1896.

JAMES T. JONES, Clerk.¹

By using the outlines of the foregoing forms it will be easy for counsel to construct one adapted to the facts of his particular case.

§ 638. Fixing master's compensation — Continued.— While the practice, as stated, is for the master to simply append, as a foot-note to his report, the statement of a lump sum as a compensation for his services, the far better course is to make a detailed statement of the services rendered and the amount charged for each item. Such a statement fur-

¹ The above form is copied from where the case, by a misprint, is reported as *Finance Committee v. Warren* (Cir. Court of Appeals, 7th Ct.), 53 U. S. App. 472, 82 Fed. 525, .

nishes a basis for the master's motion in case he is compelled to invoke the aid of the court to enforce its collection, or will serve a useful purpose in case the party liable for payment attempts, by motion, to secure a reduction on the ground that the amount claimed is excessive. The practice of charging up a lump sum for services rendered is not proper, as this method of reporting fees and charges can easily be made a cover for illegal and oppressive exactions. An itemized statement of services should be rendered. The statutory fees, if any, should be made out, and, if additional services have been rendered for which fees are not fixed by the statute, but are to be determined by the chancellor, there should be an itemized statement of such services, showing the nature of the services and time occupied, and the action of the court in allowance of the same, and also the report should show whether such costs have been paid, and if paid, by whom.¹ For the purpose of securing accuracy in such statement, and as a further protection to the rights of all parties concerned, a rule of court should require the master to keep regular minutes of all proceedings before him, showing each adjournment and the length of time actually consumed, and to return a copy to the court with his report in each case as a basis for the action of the court in cases where it becomes necessary to fix the fees of the master. Pennsylvania Equity Rule 17 provides as follows: "The master shall keep and return regular minutes of his proceedings, showing the different sessions and the length of time actually consumed, and the names of witnesses examined at each meeting, and the cause of delay, if any, so that the court may adjust the amount for the costs and expenses, and direct how the same be paid."²

Due notice of the time and place of hearing having been given to all parties the matter comes on for hearing, the issue being: What were the services rendered by the master, and what will be a reasonable compensation therefor? In some cases the additional issue is presented as to who is liable for the services rendered. Upon such hearing all the files and papers in the cause are admissible for the purpose of showing the nature and extent of the services required of the master.

¹ Schnadt v. Davis, 185 Ill. 476, 487, 57 N. E. 652.

² Hoofstittler v. Hostetter, 172 Pa. St. 575, 577, 83 Atl. 753.

The master's minutes, together with the oral testimony of witnesses, are admissible to show what services were actually rendered and their character. After which, upon the hearing of the motion in *Finance Company v. Warren*,¹ Major Bluford Wilson, the standing master of the United States circuit court at Springfield, was permitted to testify what his observation had "been as to the rule of compensation to the master for services rendered similar to those rendered" in the case on hearing. From all the facts and circumstances shown the court allows the master such compensation for his services as is reasonable and right, "having regard to all the circumstances thereof."

In speaking of the master's compensation for his services in taking testimony, hearing argument of counsel and making his report, Judge Butler of the United States circuit court, eastern district of Pennsylvania, says: "He is called to assist the court in discharging its judicial functions, and his compensation may, and should, I think, be measured by the standard of judicial salaries. The highest salary paid in this court is \$6,000, and if the master is compensated as the judge is for the same period and extent of labor, he cannot complain of injustice."²

Judge Jenkins, of the United States circuit court of appeals, does not approve of this standard of measurement of the master's compensation. He seems to think that cases might arise where such a rule would work an injustice to the master. He says: "We cannot agree with the ruling in *Middleton v. Telegraph Co.*, 32 Fed. 524, that compensation in such cases should be measured by the standard of judicial salaries,—which are not infrequently meager."³

The amount allowed by the court is not conclusive, but may be increased or diminished at any time if the court is satisfied that justice requires it. When the amount of compensation

¹ 53 U. S. App. 472, 82 Fed. 525.

² *Middleton v. Bankers' and Merchants' Tel. Co.*, 32 Fed. 524. In this case the master was allowed \$1,000, his report and statement to the court showing that he did a large amount of work, the property and interests involved being great,

and the court finding the conduct of the master, throughout the business submitted to him, very satisfactory.

³ *Finance Company v. Warren*, 53 U. S. App. 472, 82 Fed. 525. For measurements of attorney's fee by comparison with salaries paid to judges, see *post*, § 646.

for services to be performed by an officer of the court is to be fixed by the court in its discretion with reference to the special circumstances, it must be a very clear case indeed which will deprive the court of the right to modify the compensation if it should turn out, before it is paid, that the circumstances which determined the court's judgment were not the actual ones. Allowances to a master during the progress of a cause are never considered as conclusively estopping him from asking and obtaining further allowance at the end of the cause, if he can show to the court that he has been, all things considered, insufficiently compensated. It is not unusual for the court, upon the petition of the master at the winding up of the litigation in a railroad foreclosure cause, to review the services the master has rendered, the time which he has devoted to it, the interruption to his own business, the interference with opportunities for earnings, the amounts involved, and the assistance he has given to the court and to the parties interested in the fund, and upon all the facts, many of which are generally within the knowledge of the judge from his dealings with the cause, to increase the master's compensation.¹ This being true, it follows as a matter of course that if the court has fixed the master's compensation in advance, say at so much per month, the court may at any time in its discretion, before payment, modify the order by decreasing the amount to be so paid, if the facts and circumstances, in the opinion of the court, demand it.²

§ 639. Fixing master's compensation — Continued — What to be considered.— In determining the amount to be allowed a master as compensation for his services the court should take into consideration:

First. The amount of labor required and performed by the master in executing the order of reference.

Second. The degree of care used in the discharge of the duties enjoined upon him.

Third. The amount involved in the controversy and consequent degree of responsibility resting upon him.

Fourth. All other circumstances connected with the reference which should properly affect the amount of compensation to be allowed.

¹ *Pleasants v. Southern Ry. Co.*, 93 Fed. 93, 97-98.

² *Id.*

Where special services are required of the master, services highly responsible in character and requiring great caution on his part, he should be compensated accordingly.¹ What another would be willing to do the same work for is not a proper criterion in fixing the compensation of an officer of the court. The duties to be performed are not thus to be put up at auction, but such compensation should be graduated somewhat by the duties and somewhat by the responsibilities of the situation.²

In reviewing the services of the master, when called upon to fix his compensation, the court should take into consideration the time he has devoted to the matter, the interference with opportunities for earnings, the amount involved in the controversy, and the assistance he has been to the court and to the parties interested, and, in the light of all these circumstances, make such an allowance as shall be right and proper.³ The master should only be allowed compensation for services required of him by the order of reference. If he takes it upon himself to perform useless and unnecessary labor it must be disregarded in fixing his compensation. For example, if the master incorporates the evidence in his report without the special direction of the court, he cannot be allowed for it in the taxation of costs, although it was done upon the solicitation of counsel.⁴ So, too, if the master goes beyond the power given him by the order of reference, his action to that extent is a nullity,⁵ and of course for such services he should receive no compensation. But if for any reason the master has been compelled to perform extra labor, without fault on his part, he should be compensated for the same. Thus, where an injunction was obtained by the defendants against the sale of mortgaged premises, it was held that, upon the dissolution of the injunction, the matter being referred to the master to ascertain and report the damages, he rightfully included "fees

¹ *Erie Ry. Co. v. Heath*, 10 Blatch. (U. S.) 214, Fed. Cas. 4,516. In this case the master was allowed for his services \$10,190.71.

² *Cowdrey v. Railroad Co.*, 1 Woods, 331, Fed. Cas. No. 3,293.

³ *Pleasants v. Southern Ry. Co.*, 93 Fed. 93, 97, 98.

⁴ *In re Hemiup*, 3 Paige, 305, 307.

⁵ *White v. Walker*, 5 Fla. 478, 486; *Gordon v. Hobart*, 2 Story, 243, 260, Fed. Cas. 5,608; *Lever v. Redwood*, 9 Porter (Ala.), 79, 94; *Harris v. Fly*, 7 Paige, 421; 2 Daniell, Ch. Pr. (4th ed.), p. 1296.

for services, in relation to the sale, which the master would have to perform the second time in consequence of the sale being stopped, and also the expense of readvertising the sale of the mortgaged premises;" but the master was not entitled to commissions except where the property, which he was directed by the decree to sell, was actually sold by him.¹

Mr. Justice Jenkins, of the United States court of appeals, in commenting upon this subject and the elements to be taken into consideration in fixing the master's compensation, says: "A master in chancery occupies, it is true, a position of responsibility and of trust. The court looks to him to execute its decree thoroughly, accurately, and in full response to the confidence placed in him. His compensation should be measured accordingly. He should be remunerated for the actual work done, and the time employed, and the responsibility assumed. The amount of compensation should be fixed with due regard to the magnitude of the interests involved and to the responsibility of the position. The amount of such compensation, while it should be reasonable, and perhaps liberal, should not be exorbitant. Possibly, much ground for complaint would be avoided if the amount of compensation could be determined by some fixed standard. Yet so various and dissimilar are the services performed, and the character and extent of the responsibilities assumed, that it might work injustice to deal with such matters by any ironclad rule."²

The important and valuable assistance rendered to the court by the master, and which ought to be taken into consideration by the court in fixing his compensation, is well stated by Judge Chetlain of the superior court at Chicago, as follows:

"In this county, in involved cases, where there is a large amount of testimony, or where there is a difficult accounting, references to a master are necessary; and it is owing to the competent assistance given by the masters that the chancery dockets of this county are not crowded as the law dockets are. The master's services are similar to those performed by a judge, and in order to have competent masters they must be paid reasonable compensation for their services; and in determining what is just and reasonable compensation, it must be

¹ Edwards v. Bodine, 11 Paige Ch. 223.

² Finance Company v. Warren, 53 U. S. App. 472, 82 Fed. 525.

borne in mind that they are obliged to furnish court room, clerks and other conveniences, whether they have work or not, and that they are only paid when they have work. For this reason it has been the practice of the judges of this county to allow the master a *per diem* of not less than \$25 for services for which the statutory fee is not fixed and which is to be fixed by the court. These last mentioned services are performed not only when the master considers and formulates his report, but also during the progress of the hearings and proceedings had and taken before him. The amount *per diem* above \$25 depends upon the magnitude of the interests, the importance of the matters at issue, and the intricacies of the questions involved.”¹

The report of the master, embodying, as it does when properly drawn, results or conclusions, furnishes, in most instances, but a faint idea of the painstaking and laborious processes by which those results or conclusions were arrived at. After the close of a protracted hearing, covering not infrequently a period of several months, the counsel, parties and witnesses go their several ways, leaving the master alone in his office, there to begin what often proves the greatest, most difficult and most responsible part of his labor. The testimony, covering, as it sometimes does, hundreds and often thousands of pages of type-written matter, must be carefully read, and often carefully abstracted, in order to arrive at his conclusions of fact. After this labor is performed the next problem presented is: What is the law applicable to such a state of facts? The solution of this question often requires a vast amount of labor. The argument of counsel occupied days, perhaps, in its presentation, during which an array of authorities was presented, all of which the master is expected to examine before arriving at his legal conclusions. This oral argument and citation of authorities is frequently supplemented by type-written briefs, in which counsel repeat their conflicting contentions, all of which must be carefully examined, together with the authorities cited. Out of this chaos the master is expected to bring forth order; from this Babel of confusion he is required to deduce logical results and embody these results in his report to the court,

¹ Opinion in *Farwell v. Harvey Steel Car Co.*, quoted by G. Fred Rush, *Chicago Legal News*, vol. 88, p. 252.

and recommend such a decree as will protect the rights of all parties in interest — a decree which will secure equal and exact justice to all. All this should be taken into consideration in fixing the master's compensation. In short, the amount allowed him should be commensurate with his labor and responsibility — no more and no less.

§ 640. Fixing master's compensation — Continued — Who liable — Time of payment.— Upon the question of liability, as between the parties the rule is that the losing party must pay the costs, but to this rule there are many exceptions, the whole matter, as shown in a subsequent section, resting in the sound discretion of the court.¹ A better statement of the rule is that the losing party is *prima facie* liable for costs, but that it is always competent to show circumstances to excuse him from such liability. This is the rule as between the parties, but, as between a party and the officer who has rendered services at his request, the rule is different, each party being liable for all services rendered at his instance or request, irrespective of the result of the suit. Under this rule, where, during the progress of a reference, a party is compelled to pay costs which the result shows his adversary ought to pay, he has a right to collect the amount so paid, at the end of the litigation. Under this rule, when a party calls a witness, he is to pay the expenses of taking the direct and redirect examination of that witness, while his adversary must pay the expense of taking the cross and recross examination of the same witness. On this basis each side should pay, in the first instance, for its own adjournments, and the costs, charges, expenses, including master's fees, for taking its own direct, redirect, cross or recross examination of any witness or witnesses. Assuming that these costs and charges are paid by the parties, as the hearing progresses, upon final decree the sums so paid by the prevailing party may be imposed upon the defeated party.² Questions frequently arise as to a fair and equitable apportionment of costs and charges in the master's office. Upon this question Lacombe, J., says: "When a session is taken up entirely with taking testimony, the expenses of taking which one

¹ *Post*, §§ 641, 642.

² *Brickill et al. v. Mayor, etc. of City of New York* (C. C. S. D. N. Y.), 55 Fed. 565.

side is to bear, the master's fees for that session are to be paid by that side. If, however, the session is taken up partly with taking testimony which one side is to pay for, and partly with taking testimony which the other side is to pay for, the master's fee for that session is properly chargeable, in equal shares, to both, irrespective of the proportionate amount of time consumed by both. Sessions consumed in whole or in part by argument may be settled for in the same way. Time consumed in consideration and decision of the questions involved, and in preparing the report, is chargeable, in equal shares, to both parties."¹ Each party is required to pay for the examination of his own witnesses, and also must pay for taking down the cross-examination of his adversary's witnesses.² Where the services of the master are required at the instance of the plaintiff and the master's fees cannot be collected from the defendant, either by reason of his insolvency or because he has left the state, the plaintiff is responsible for such fees, and the fact that the decree requires the defendant to pay them makes no difference;³ and a party in whose favor a master makes his report should pay the master's fee in the first instance. Having so paid it, he may recover from the party upon whom the costs are placed.⁴

The question arises sometimes as to the time at which a master has a right to call upon the parties for payment, or part payment, for services rendered, and upon this question the decisions are not harmonious, some of the courts holding the master should complete his services, at least up to the making of his report, while others take the opposite ground, that is, that it is unreasonable to insist upon the master waiting until the end of a protracted litigation without receiving any portion of his compensation. The former position is taken by the supreme court of Illinois, while the latter is held by the supreme court of Pennsylvania. In a recent case the supreme court of Illinois say that he should not demand his compensation until his services are fully rendered, for two reasons. *First*. Because an inspection of the report is necessary to enable the

¹ Id., 566.

Orphan Asylum, 2 Wright (38 Pa. St.), 535.

² Sawyer v. Sawyer, Walker Ch. 48.

³ Lowenstein v. Biernbaum, 8 W. N. C. 801; Appeal of St. Joseph's

⁴ Thomson's Appeal, 11 W. N. C.

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court to ascertain and determine the just compensation to be paid to the master and by whom it shall be paid. *Second.* Before the master has completed his work, he is, in a sense, clothed with judicial power over the rights and interests of the parties, and their relation to the master is such that they should not then be called on to accede to or contest his demands for services to be rendered in the matter of deciding for or against them;¹ while the Pennsylvania court say that it is unreasonable to expect a master to wait until the end of a protracted litigation before receiving any part of his compensation. If he has devoted his time for months to his duty, and the end is not yet in sight, he has a right to apply to the court for immediate payment of a proportionate part, upon which application a court can make such order as seems proper. If this is not done, it is highly improper for the master to receive any part of his compensation from one of the parties without the knowledge of the other, or of the court. To do so is, to use the mildest term, unseemly. A master ought not only to be honest, but he must also appear to be honest.²

The practice adopted by referees, in certain cases, of receiving from one of the parties, at stated periods during a reference, the fees which such party would be liable for at the end of the case, on the assumption that such party will be beaten, is strongly disapproved by the superior court of New York, "as introducing a dangerous feature into the referee system which should be at once discontinued." The court further add: "Referees are judicial officers charged with a responsible trust; they take the place of the jury as well as of the court, and their finding upon the facts is generally accepted as conclusive. Like jurors, or arbitrators, they should be persons entirely unbiased and indifferent between the parties, or their competency to act may in like manner be challenged, and any secret understanding as to receiving fees in advance from one party, or any other act of misconduct calculated to bias or influence any one of the referees in his conduct, or to prejudice either party, is generally regarded as ample cause for removal, and for setting aside the award when made.³ So, too, the

¹ Schnadt v. Davis, 185 Ill. 476, 487, 57 N. E. 652.

² Powell's Estate, 163 Pa. St. 349, 368.

³ Goldberger v. Manhattan R. Co., 8 N. Y. Misc. 441, citing Forest v. Forest, 3 Bosw. 650; Dorlon v. Lewis, 9 How. Pr. 1; Yale v. Gwinits, 4 How.

question sometimes arises as to whether the master can be compelled to return his report until his fees have been paid, or, in other words, whether he has the right to "retain his report as security for his compensation." The practice in this regard is also different in different jurisdictions. Under the practice in Illinois the only method of compelling a master to surrender his report is for the party interested in its return to go into court, and, by a proper motion, obtain an order fixing the amount of the master's compensation, and then pay, or at least tender, the amount so fixed, after which the court may compel the master to return his report.¹ Until this is done the master cannot be compelled to return into court the evidence given before him at the instance of a party, without paying him for taking it.² An officer is entitled to his pay for his services as he renders them.³ In the federal courts, however, the practice is different; there the master having no right to insist upon his compensation being paid before returning his report. This is expressly provided for by Equity Rule No. 82, as follows: "The master shall not retain his report as security for his compensation; but, when his compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court."⁴ Under this rule, and also rule No. 83, it is the duty of the master, "as soon as his report is ready," to "return the same into the clerk's office," no matter whether his fees are paid or not. If his compensation is not paid, his remedy, under these rules, is to have the same fixed by the court and then collect by attachment.⁵ The same course of practice, it seems, obtains in Pennsylvania, it being there held that a master has no right to retain his report

Pr. 253; *Livermore v. Bainbridge*, 44 How. Pr. 357, 47 How. Pr. 354; *Marie v. Garrison*, 1 How. Pr. (N. S.) 32; *Devlin v. Mayor*, 7 Daly, 466; *Carroll v. Lufkins*, 29 Hun, 17; *Burrows v. Dickinson*, 35 Hun, 492; *O'Brien v. Long*, 49 Hun, 80.

¹ *Brown v. Mortgage Co.*, 110 Ill. 265; *Rickert v. Suddard*, 184 Ill. 149, 158; *Schnadt v. Davis*, 185 Ill. 476,

483, 484; *Nutriment Co. v. Green Lumber Co.*, 195 Ill. 324.

² *Rimmer v. O'Brien-Green Co.*, 64 Ill. App. 104, 107.

³ *People v. Rockwell*, 2 Scam. 3; *People v. Harlow*, 29 Ill. 43.

⁴ Rule as amended April 16, 1894, 152 U. S. 709; 3 *Desty's Fed. Proc.* 1800.

⁵ *Frese v. Biedenfeld*, 14 Blatch. 402, Fed. Cas. 5,111.

for his compensation, much less to refuse to proceed. The rules provide an effective remedy which he must follow. If he abandons his duty in the midst of proceedings he forfeits all compensation for services rendered.¹

III. OF COSTS GENERALLY IN CASE OF A REFERENCE.

§ 641. Discretion of court — Apportionment of costs.— In equity costs do not always follow the decree; but, unless otherwise provided by statute, are in the sound discretion of the court, and are to be awarded or refused according to the justice of each particular case; yet in general the prevailing party is entitled to costs in equity as in law.² The discretion of the lower court in fixing fees not regulated by the statute will not be disturbed, unless there has been an abuse of such discretion. Appellate courts are generally not disposed to disturb the findings of lower courts in the matter of compensation for services of trustees, solicitors, receivers and masters rendered in the conduct of litigation in said courts, whether based on findings of masters or verdicts of juries, unless injustice clearly appears, for the reason that the court below should have considerable latitude of discretion on the subject, since it has far better means of knowing what is just and reasonable than an appellate court could have.³ The upper court will reluctantly disturb an order relative to costs or master's fees "when much must rest largely in the discretion of the court below."⁴ In the apportionment of costs in a chancery proceeding, where the question at issue is a novel one and the parties are acting in good faith, the court may require each party to pay his own costs, or make such other order as may be deemed equitable;⁵ and in this regard the fee of a master, as well as

¹ Huddy v. Caldwell, 6 W. N. C. 448. 54 Fed. 614, 617; Trustees v. Green-

² White v. Walker, 5 Fla. 478, 508; Gage v. Gowdy, 141 Ill. 215, 30 N. E. 320; Waterman v. Alden, 144 Ill. 90, 32 N. E. 972; Rogers v. Tyley, 144 Ill. 652, 32 N. E. 393; Tearney v. Fleming, 48 Ill. App. 507; Citizens' Ins. Co. v. Hamilton, 48 Ill. App. 593.

³ Finance Company v. Warren, 53 U. S. App. 472, 82 Fed. 525.

⁴ Snyder v. Stafford, 11 Paige, 71.

⁵ Whitney v. City of New Orleans,

other costs in equity, are within the discretion of the court where the suit is brought. That court has not only the power to fix the costs, but also to make any proper order for their payment, and, when the master has made application to that court for an order on the party liable to pay his fee, he will not be permitted to bring assumpsit therefor in the common-law court, on the ground that the chancery court has delayed such order. There may be reasons, deemed sufficient by that court, to justify it in postponing or refusing such application. The common-law court could know nothing of this; besides, it would be an anomalous proceeding for a court of law to take up the matter where a court of chancery had already taken cognizance of it. The latter court is fully competent to attend to its own business.¹ In a case of accounting the court in apportioning the costs may and should take into consideration items of account "won and lost" by the respective parties and make such order as shall seem equitable. In passing on this question Wheeler, J. (U. S. C. Ct. D. Vermont), said: "Both parties have prevailed and failed to some extent upon the items disputed and litigated, and far enough so that an apportionment of costs seems proper. Upon consideration of the items in dispute won and lost by the respective parties, and the time and expense probably spent upon each, it seems most just that the orator be allowed five-sevenths of his costs, and the defendants two-sevenths of theirs."²

The question of costs frequently arises upon the allowance or disallowance of exceptions to the master's findings. In passing upon this question it is proper to keep in mind the rule that the allowance of costs is always discretionary in chancery cases. Chancellor Kent, in speaking of this subject, says: "The allowance of costs is no doubt discretionary in this, as in other cases; but I think, it will, upon the whole, be most equitable and just to follow the rule which I have adopted in other cases, arising upon exceptions to reports, and allow to each party the costs on the exceptions in which he has been successful."³ Yet, as the whole question as to costs is discretionary, the court will enforce this rule or depart from it as

¹ Woodward v. Brace, 139 Pa. St. 316, 20 Atl. 1001.

² Methodist E. Church v. Jaques, 2 Johns. Ch. 77, 117; Green v. Winter,

³ Bridges v. Sheldon, 7 Fed. 17, 42. 1 Johns. Ch. 28, 43, 7 Am. Dec. 475.

equity may require;¹ but the general rule is that each party recovers costs on those exceptions on which he succeeds and pays costs on those upon which he fails.² The rules of court should provide that in all cases where the objections and exceptions of a party are held to be frivolous, or taken for delay only, he should pay all costs incurred thereby. Such an order, properly enforced, would save parties and litigants vexatious delay, and prevent the wasting of the time of the court. Lord Bacon's rule, if rigidly enforced, would bring about a reform in this regard: "In all suits where it shall appear upon the hearing of the cause that the plaintiff had not *probabilem causam litigandi*, he shall pay to the defendant his utmost costs to be assessed by the court."³ The United States Equity Rule No. 84 goes even farther than this, by making the exceptant pay the cost of *every* exception overruled, and the other party of *every* exception allowed. This rule governs in the federal courts, and is as follows: "In order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled, pay costs to the other party, and for every exception allowed shall be entitled to costs, the costs to be fixed in each case by the court by a standing rule of the circuit court."⁴ It has been held that a solicitor's fee is not a cost within the meaning of this rule.⁵

§ 642. Discretion of court — Apportionment of costs — Continued.— While it is true that in chancery cases costs, as as rule, are in the discretion of the court, this does not mean an arbitrary discretion, but, on the contrary, in apportioning the costs, or in determining a party's right to recover costs, or his liability to pay the same, the court has no right to disregard well recognized rules applicable to such questions, but, in forming its conclusions, will be guided or controlled thereby. For example, unless there is some good reason to the contrary, the winning party is entitled to recover his costs from his adversary; and, in speaking of the court's right to apportion

¹ For a modified application of the rule see *Stoughton v. Lynch*, 2 Johns. Ch. 209, 223. *Methodist E. Church v. Jaques*, 3 Johns. Ch. 77.

² *Hunn v. Norton*, Hopk. Ch. 344; *Norton v. Whiting*, 1 Paige, 578;

³ Beames' Orders in Ch., p. 24.

⁴ 8 Desty, Fed. Proced. 1805.

⁵ *Garretson v. Clark*, 17 Blatchf. 256, Fed. Cas. No. 5,242.

costs in such a case, it is meant that, for good cause shown, the court may depart from the rule by requiring the winning party to pay a portion of the costs. Thus, a party who succeeds in a substantial particular on exceptions to a master's report is, as a general rule, entitled to recover his costs in such proceeding;¹ yet the question submitted to the court by the exception may be such a novel one, and the good faith of the party presenting it so apparent, that in justice the costs should be divided by compelling the winning party to pay a portion of the same.² Again, the winning party's conduct may have been such as to render it inequitable that his defeated adversary should be required to pay all the costs. For example, the winning party may have persisted, against the objection of his adversary, in taking a mass of immaterial testimony. The materiality of testimony is to be determined by the issues as made by the pleading, and where a party insists on taking a mass of evidence upon matters not in issue, he should be required to pay the cost of taking the same, irrespective of the result of the litigation.³ As the question of costs is always within the discretion of the chancellor, he should discourage this too common practice by making the guilty party pay the penalty. Therefore, while the rule is as stated, that the losing party should pay the costs, we see that it is always competent for him to show circumstances to satisfy the court that it would be inequitable to require him to do so.⁴

IV. STENOGRAPHER'S CHARGES.

§ 643. Fees of stenographers — Whether taxable as costs. The question sometimes arises whether the charges of a stenographer, for services in case of a reference, are taxable as costs; and the answer, in the absence of a statutory provision or rule of court permitting it, seems to have been uniformly in the negative. Thus, in the United States district court, district of Vermont, the question arose as to the right to tax up

¹ Sanford v. Clarke, 88 N. J. Eq. 265. 60 Am. Dec. 216; Moyers v. Coiner,

² Snyder v. Stafford, 11 Paige, 71. 22 Fla. 422; Lewis v. Yale, 4 Fla. 441;

³ Personette v. Johnson, 40 N. J. Hunter v. Marlboro, 2 Woodb. & M. Eq. 532. (U. S.) 168, Fed. Cas. 6,908; Stone v.

⁴ Walling v. Kinnard, 10 Tex. 508, Locke, 48 Me. 425.

the charges of a stenographer, for services before the master, as a part of the costs. A stenographer was engaged by the parties to take down the oral testimony of the witnesses upon the hearing before the master, who certified that this was done by his procurement as master, and that the charges should be taxed as costs of the accounting, but it did not appear that the parties agreed that these charges should be so taxed. Upon this state of facts the court say: "Whether they can be or not depends on the authority of the master. The master has, under the equity rules, very large discretion about the production of testimony and the order of examination of witnesses and of procedure before him, but these charges are not made taxable fees or costs by either statute or rules, and the question is whether the master can make such charges taxable when the law has not made them so. The court cannot employ a stenographer at the expense of the government, neither could it at the expense of the parties without their consent, nor allow any one to do so at the expense of another, by requiring the expense to be treated as taxable costs. The authority of the master cannot exceed that of the court appointing him."¹ The result was these charges were left "to be borne by the parties according to their contract without being taxed."

Under the statute of Illinois no provision is made for the payment for the services of stenographers employed in taking testimony or other services in the master's office. Such services are for the master, and to him they must look for their compensation and not to the parties or to either of them. The statute allows him fifteen cents per one hundred words for taking and reporting testimony and no more can be legally exacted. If he chooses to have a stenographer to take the evidence in short-hand and afterward transcribe it, the stenographer is simply assisting him in the discharge of a duty imposed upon him — that of taking and reporting the testimony. Such stenographer is not an officer of the court, has no legal connection with it, the master or the case, and the court has no power to fix any compensation for such services.² In a very recent case the question came again before the su-

¹ *Bridges v. Sheldon*, 7 Fed. 17, 42.

² *Schnadt v. Davis*, 185 Ill. 476, 484, 485, 57 N. E. 652.

preme court of that state, in which the court held that by virtue of the statute, where a case is referred to a master to take the evidence and report his conclusions to the court, it is the duty of the master to hear the witnesses, and to take, or cause to be taken and reduced to writing, their testimony, and report the same to the court, and all he can demand for so doing is the fees allowed by statute; and in that state the master cannot require a litigant to pay the charges of a stenographer for taking and transcribing the testimony, in addition to the fees allowed him by statute for performing the same duty.¹ Under such an order it is the duty of the master to have the witnesses brought before him and examined in his presence. The testimony of the witnesses is presented to the master orally, and is thus before him for consideration, and *his* duty is to reduce it to writing, or have it so reduced to writing, and report it to the court. If the master rules a party to pay a stenographer for taking and transcribing the evidence, and refuses to consider such evidence because the party refuses to comply with such rule, it is good ground of exception, and it is error to approve the act of the master.²

Commenting upon the effect of these decisions upon the practice in the master's office, Mr. G. Fred. Rush, one of the masters in chancery of the superior court at Chicago, makes the following pertinent remarks: "Under these decisions the master, while compelled to write down the oral testimony, *is not compelled to hire a stenographer to report it*. In Cook county the hiring of a competent court stenographer would cost the master twelve and one-half cents per page more than the master receives as his fees. Therefore, if parties do not, as in the past, hire stenographers as well in the master's office as they do in court, the master, of course, will write down the oral testimony *in long hand*. If the parties desire to speed and facilitate the taking of testimony beyond what is possible if the master himself writes it down in long hand, they must stipulate to hire and pay stenographers, and this without prejudice to the master's statutory fees. There is much misunderstanding as to the effect of the above decisions

¹ Nutriment Co. v. Green Lumber Co., 195 Ill. 324, 63 N. E. 152; Schnadt Co., 195 Ill. 324.

v. Davis, 185 Ill. 476, 485, 57 N. E.

² Nutriment Co. v. Green Lumber 652.

upon the local Cook county practice in the master's office. The only practical effect, in cases where parties desire and therefore stipulate for typewritten testimony, is that the master, in stating his charges, must specify the items of services and fees in his report, making a separate item of the taking of testimony, giving the number of folios of one hundred words each."¹ The result is that parties find it far less expensive to employ and pay stenographers to take down and furnish transcripts of the testimony than to require the master to write it out in long hand, not counting the loss of time which would be incurred by the latter course. So, too, in West Virginia it is held that a commissioner appointed to execute an order or decree of reference entered by the circuit court is not entitled to employ a short-hand reporter or amanuensis.² In some jurisdictions, however, either by statute or by a rule of court, the master is authorized to employ a stenographer in case of a reference, and to tax up the fees for the same as part of the costs of the reference. Thus, upon a reference in Pennsylvania, a master may, at the request of the parties, appoint a stenographer to take down the proceedings. The fees of such stenographer are fixed by the master and taxed as costs.³ So, too, in New Jersey it is provided by statute that the master may "employ a competent stenographic reporter to take down the evidence," and that the stenographer so employed shall be paid for such service the "same and no more as the respective stenographers employed in the circuit courts," and that the same "shall be paid on the certificate of the advisory master approved by the chancellor, by the state treasurer, out of the fees received by him from the court of chancery."⁴

V. ATTORNEYS' FEES.

§ 644. Attorneys' fees — When to be allowed as part of costs.— The question frequently arises in cases of reference whether or not attorneys' fees are taxable as part of the costs,

¹ Chicago Leg. News, vol. 83, p. 252.

² Weigand v. Alliance Co., 44 W. Va. 133, 28 S. E. 803.

³ Brightley's Purdon's Dig., p. 1945.

⁴ Rev. Stat. 1895, pp. 897, 398, §§ 180, 133.

and, if so, what amount can be so taxed? The answer to the first question depends:

First. Upon the jurisdiction in which the proceeding is pending; and,

Second. Upon the nature of the proceeding and the contract of the parties.

In most jurisdictions a stipulation in a mortgage, or a trust deed, for the allowance of a reasonable attorney's fee in case of foreclosure, is recognized as valid and binding, and will be enforced accordingly. This is almost the universal rule.¹

¹Such a stipulation is valid and enforceable in —

Alabama: Munter v. Linn, 61 Ala. 492; Wells v. American Mortgage Co., 109 Ala. 430, 20 So. 136.

Arkansas: Jefferson v. Edrington, 58 Ark. 545, 14 S. W. 99.

California: Carriere v. Minturn, 5 Cal. 435; Patterson v. Donner, 48 Cal. 369; Bank of Woodland v. Treadwell, 55 Cal. 379; Alden v. Pryal, 60 Cal. 215; Moran v. Gardemeyer, 82 Cal. 96, 23 Pac. 6; Sichel v. Carrillo, 42 Cal. 493; Mascarel v. Raffour, 51 Cal. 242; Clemens v. Luce, 101 Cal. 482, 35 Pac. 1032; Boob v. Hall, 107 Cal. 160, 40 Pac. 117; Avery v. Maude, 112 Cal. 565, 44 Pac. 1020.

Florida: L'Engle v. L'Engle, 21 Fla. 131; Long v. Herrick, 26 Fla. 356, 8 So. 50; Adams v. Fry, 29 Fla. 313, 10 So. 550; Taylor v. Brown, 32 Fla. 334, 13 So. 957; Kellogg v. Singer Mfg. Co., 35 Fla. 99, 17 So. 68.

Georgia: Bank v. Danforth, 80 Ga. 55, 7 S. E. 546; Merck v. Mortgage Co., 79 Ga. 213, 7 S. E. 265.

Idaho: Broadbent v. Brumback, 2 Idaho, 336, 16 Pac. R. 555.

Illinois: Clawson v. Munson, 55 Ill. 394; McIntire v. Yates, 104 Ill. 491; Haldeman v. Massachusetts Life Ins. Co., 120 Ill. 390, 11 N. E. 526; Barry v. Guild, 126 Ill. 439, 18 N. E. 759, 2 L. R. A. 334; Casler v. Byers, 129 Ill. 657, 22 N. E. 507; Telford v. Garrels, 132 Ill. 550, 24 N. E. 573;

Heffron v. Gage, 149 Ill. 182, 36 N. E. 569; Guignon v. Union Trust Co., 156 Ill. 135, 40 N. E. 569, 47 Am. St. R. 186; Dorn v. Ross, 177 Ill. 225, 52 N. E. 321; Culver v. Brinkerhoff, 180 Ill. 548, 54 N. E. 585; Thornton v. Commonwealth Loan Ass'n, 181 Ill. 456, 54 N. E. 1037; Baker v. Aalberg, 183 Ill. 258, 55 N. E. 672.

Indiana: Johnson v. Hosford, 110 Ind. 572, 10 N. E. 407; Billingsley v. Dean, 11 Ind. 331; Wyant v. Pottorff, 37 Ind. 512.

Iowa: Weatherby v. Smith, 30 Iowa, 131, 6 Am. R. 663; Sperry v. Horr, 32 Iowa, 184; Schmidt v. Potter, 35 Iowa, 426; Cook v. Gilchrist, 32 Iowa, 277, 48 N. W. 84.

Kansas: Seaton v. Scovill, 18 Kan. 433, 26 Am. R. 779; Howestein v. Barnes, 2 Dill. 482, 29 Am. R. 406.

Louisiana: Dietrich v. Bayhi, 23 La. Ann. 767; Mullan v. His Creditors, 39 La. Ann. 397, 2 So. 45.

Minnesota: Griswold v. Taylor, 8 Minn. 342; Jones v. Radatg, 27 Minn. 240.

Missouri: Bank v. Gay, 63 Mo. 33.

Nevada: Cox v. Smith, 1 Nev. 161, 90 Am. Dec. 476.

Pennsylvania: Woods v. North, 84 Pa. St. 407, 410, 24 Am. R. 201; Johnston v. Speer, 92 Pa. St. 227; Daly v. Maitland, 88 Pa. St. 384, 32 Am. R. 457; Lindley v. Ross, 137 Pa. St. 629, 20 Atl. 944; Wilson v. Ott, 173 Pa. St. 253, 34 Atl. 23, 51 Am. St. 767;

To entitle a party to recover attorneys' fees in a foreclosure proceeding four things are necessary:

First. There must be a stipulation to that effect in the mortgage, or, in the absence of such a stipulation, there must be a statute authorizing it.

Second. The necessary foundation must be laid in the pleadings; that is, the claim therefor must be made in the bill.

Third. As the allowance of such fee always depends upon a condition specified in the stipulation, or in the statute, the burden is on the plaintiff to show the existence of the condition which justifies its allowance.

Fourth. In case the amount depends upon a statute, or, in case of a stipulation, if the amount is left blank, or it simply provides for a "reasonable fee," then the burden is on the plaintiff to show by competent evidence what is a reasonable fee for the services rendered.

To these requirements there ought to be added a —

Fifth. The party seeking to have the court allow attorneys' fees should, to justify such an allowance, be required to show either that he has paid the sum sought to be allowed, and that such amount is a "reasonable fee," or, if not actually paid, that he has become legally liable therefor.

§ 645. Attorneys' fees — When to be allowed as part of costs — Continued.— Some suggestions will here be made under each of the headings mentioned in the last section, and,—

Warwick Iron Co. v. Morton, 148 Pa. St. 72, 23 Atl. 1065; *Walter v. Dickson*, 175 Pa. St. 204, 34 Atl. 646; *McAllister's Appeal*, 59 Pa. St. 204; *Lewis v. Bank*, 96 Pa. St. 86.

South Carolina: *Aultman, etc. Co. v. Gibert*, 28 S. C. 303, 5 S. E. 806; *Knight v. Jackson*, 36 S. C. 10, 14 S. E. 982.

Wisconsin: *Morgan v. Edwards*, 53 Wis. 599, 11 N. W. 21, 40 Am. R. 781; *Voechting v. Grau*, 55 Wis. 812, 13 N. W. 230; *Killops v. Stephens*, 73 Wis. 111, 40 N. W. 652; *Wylie v. Karner*, 54 Wis. 591, 12 N. W. 57; *Palmeter v. Carey*, 63 Wis. 426, 21 N. W. 793.

But on the contrary such a stipu-

lation is held invalid, and therefore not enforceable, in —

Kentucky: *Thomasson v. Townsend*, 10 Bush, 114; *Rilling v. Thompson*, 12 Bush, 810.

Michigan: *Bullock v. Taylor*, 39 Mich. 137, 33 Am. R. 356; *Van Marter v. McMillan*, 39 Mich. 304; *Myer v. Hart*, 40 Mich. 517, 29 Am. R. 553; *Vosburgh v. Lay*, 45 Mich. 455, 8 N. W. 91; *Botsford v. Botsford*, 49 Mich. 29, 12 N. W. 897; *Bendey v. Townsend*, 109 U. S. 665, 3 Sup. Ct. R. 482.

Ohio: *State v. Taylor*, 10 Ohio, 378; *Shelton v. Gill*, 11 Ohio, 417; *Spalding v. Bank*, 12 Ohio, 544; *Martin v. Bank*, 13 Ohio, 250.

First. The right to an allowance as attorneys' fees depends absolutely upon the stipulation of the parties, or, in the absence of such a stipulation, upon the statute, and if there is neither a stipulation nor statute authorizing it, the court is powerless to make such allowance.

It must, therefore, be constantly borne in mind, that, in the absence of such stipulation or statute, the plaintiff is left precisely in the condition that all are placed in at common law, and that if the plaintiff wishes to occupy a different position he must specifically stipulate for it in his agreement.¹ In the absence of such a stipulation or statute, it is erroneous to make such an allowance, as the allowance of an attorney's fee is purely a matter of contract.²

Second. It is a well settled rule of equity pleading that the allegations of the bill, the proof, and the decree must correspond. A decree should not grant relief, warranted by the facts which the evidence discloses, where there are no averments in the bill to which the evidence can apply.³

In this case, as in all others, the party's right of recovery depends upon the claim made in his pleadings; that is, if a plaintiff intends to ask the court for an allowance as attorney fees he must make a claim therefor in his bill. In the absence of any such claim, the right, if there be one, will be considered to have been waived;⁴ and the amount of recovery is limited to the amount claimed in the bill, it being erroneous to allow a greater sum without an amendment.⁵ But the plaintiff need not allege or prove employment of counsel, as it will be presumed from counsel's signature to the bill that he has been employed and is to be paid a reasonable fee therefor.⁶ So, too, it is unnecessary to allege that the attorney's fee stipulated for

¹ Schmidt v. Potter, 35 Iowa, 426.

² Stover v. Johnycake, 9 Kan. 367; Coburn v. Weed, 12 Kan. 182; Hamlin v. Rogers, 79 Ga. 581, 5 So. 125; Wylie v. Karner, 54 Wis. 591, 12 N. W. 57; Jennings v. McKay, 19 Kan. 120; Sichel v. Carrillo, 42 Cal. 493; Mascarel v. Raffour, 51 Cal. 242; Clemens v. Luce, 101 Cal. 432, 35 Pac. 1032; Boob v. Hall, 107 Cal. 160, 40 Pac. 117; Jefferson v. Edrington, 53 Ark. 569, 14 S. W. 99; Thomas v.

Jones, 84 Ala. 302, 40 So. 270; Monroe v. Fohl, 72 Cal. 568, 14 Pac. 514.

³ Dorn v. Gender, 171 Ill. 362, 49 N. E. 492. For full discussion of this subject see *ante*, § 408 *et seq.*

⁴ Lee v. McCarthy (Cal.), 35 Pac. 1034; Augustine v. Doud, 1 Ill. App. 588.

⁵ Newburg v. Coyne, 85 Ill. App. 74.

⁶ Avery v. Maude, 112 Cal. 565, 44 Pac. 1020.

in the mortgage is a reasonable one, as this is a matter to be fixed by the court in its discretion.¹

Third. To justify the allowance of an attorney's fee, the condition upon which it depends must be shown to exist.

Where the right to have an attorney's fee taxed as part of the costs of a foreclosure proceeding depends on a stipulation of the parties, as it usually does, or upon a statute, its enforcement depends, in every case, upon the happening of a contingency, and it follows that the happening of such contingency must be shown in every instance as a condition precedent. Thus, where, in an Iowa case, the stipulation was that an attorney's fee should be taxed by the court and included in the decree of foreclosure, it was held that the parties evidently referred to the decree as the act of foreclosure, and that the mere institution of a foreclosure suit did not justify the taxation of such attorney's fee; in other words, that the condition upon which the taxation of the attorney's fee depended had not happened, and that, as the whole matter rested upon the stipulation of the parties, the court could only enforce the contract as it was made.² So, too, where the stipulation was that the attorney's fee should be paid out of the proceeds of the sale, it was held error to attempt to enforce the contract except as made by the parties;³ and in an Illinois case, where the stipulation in a second mortgage was as follows: "It is understood that if this mortgage shall be foreclosed, or a bill filed for that purpose, for the non-payment of interest, principal, or any part thereof, when the same shall become due and payable, a reasonable sum for complainant's solicitor's fees, to be fixed by the court, shall be included in the decree, or, in case of settlement before decree, taxed as costs," the holder of the first mortgage filed a bill to foreclose, making the second mortgagee a party defendant. The latter answered the original bill and filed a cross-bill to foreclose his mortgage, in which he "asked a reasonable allowance for a solicitor's fee, claiming \$200 therefor." Upon this state of facts

¹ Reed v. Catlin, 49 Wis. 686; 6 N. W. 326; Patterson v. Donner, 48 Cal. 369; citing Stover v. Johnnycake, 9 Kan. 367; Wylie v. Karner, 54 Wis. 591, 12 N. W. 57; Monroe v. Fohl, 72 Cal. 568.

² Schmidt v. Potter, 85 Iowa, 426. 14 Pac. 514; Schmidt v. Potter, 85

³ Lammon v. Austin, 6 Wash. 199, Iowa, 426.

the action of the lower court in allowing a solicitor's fee was held to be erroneous; that the intention of the parties, as expressed in their stipulation, was to indemnify the mortgagee for expenses in securing such services of a solicitor as should be necessary in the foreclosure of the mortgage; that it was "not intended to pay a solicitor's fee for unnecessary and useless services, however extensive or laborious," and that the services performed by the defendant's solicitor, being wholly useless, did not come within the terms of the stipulation; in other words, the condition upon which a solicitor's fee might be allowed had not arisen.¹ It has even been held that the usual stipulation for attorney's fee does not authorize the allowance of such fee in a case where there was a decree of foreclosure and the mortgagor paid the debt before a decree of sale was entered.² The court can only enforce the contract as it was made by the parties, and, where the right is one depending absolutely upon contract, the court will refuse to create a liability where none was created by the stipulation entered into by the parties;³ in other words, the court will not create a new contract and then enforce it.⁴ It must also be constantly kept in mind that such stipulations are strictly construed, that is, the plaintiff cannot be allowed an attorney's fee unless he contracts for it, and not then unless he brings himself squarely within its provisions.⁵

Fourth. To the general rule that the burden of proof rests upon the party holding the affirmative of the issue, the proceeding for the allowance of an attorney's fee forms no exception. Therefore, where the stipulation is for a reasonable fee it is error to allow any fee whatever without evidence showing what is a reasonable fee under the circumstances.⁶

Fifth. To entitle the plaintiff to recover attorneys' fees under a stipulation therefor, it ought to be shown that the fee

¹ Soles v. Sheppard, 99 Ill. 616, 619, 620.

² Jennings v. McKay, 19 Kan. 120.

³ Knight v. Jackson, 86 S. C. 10.

⁴ Schmidt v. Potter, 85 Iowa, 426.

⁵ Cheltenham Imp. Co. v. Whitehead, 26 Ill. App. 609; Payette v. Free Home Bldg. etc. Ass'n, 27 Ill. App. 307.

⁶ Long v. Herriok, 26 Fla. 356, 8 So.

50; Adams v. Fry, 29 Fla. 318, 10 So. 559; Taylor v. Brown, 82 Fla. 334, 13 So. 957; Kellogg v. Singer Mfg. Co., 85 Fla. 99, 17 So. 68; Casler v. Byers, 129 Ill. 657, 22 N. E. 507; Heffron v. Gage, 149 Ill. 182, 36 N. E. 569; Tholen v. Duffy, 7 Kan. 405; Schmidt v. Oregon Gold Min. Co., 28 Oreg. 9, 40 Pac. 406; Horton v. Long, 2 Wash. 435.

has been paid or that he has become legally obligated to pay the same.¹

If the evidence discloses the fact that the complainant has entered into an express contract with his solicitor to perform the services for a stipulated price, the court has no power to make an allowance in excess of the sum agreed upon.² It is well known that frequently special contracts are made between attorneys and their clients by which the services of the attorney are secured, often at starvation prices, while a "reasonable fee" is proved up and collected from the defendant, the client pocketing the difference, which in effect amounts to lending his money at an usurious rate of interest; and not only this, but such "usury" is obtained by a fraudulent deception practiced upon the defendant, the master and the court. An attorney who becomes a party to such a transaction is simply aiding his client to obtain money by "false pretenses," and in every case where the matter is brought to light, both attorney and client should be held guilty of contempt of court. In other cases contracts are entered into to do all the legal business of the client by the year for a stipulated price, while in still others the attorney is employed by a single client — a bank or other corporation — by which the exclusive services of the attorney are secured upon a salary. It is quite apparent that to allow such a client a "reasonable fee" or "the usual and customary price" for the services of his attorney in a particular case is simply making the client a present of the difference between what the services actually cost him and the amount allowed. Therefore it was held that the stipulated fee could not be allowed where the plaintiff's attorney was employed upon a salary without any sum agreed upon for services rendered in the foreclosure proceedings.³ The master should, therefore, in every case make it a special point to

¹ Patterson v. Donner, 48 Cal. 369; v. Herrick, 26 Fla. 356, 8 So. 50; Woodland Bank v. Treadwell, 55 Cal. 879; Reed v. Catlin, 49 Wis. 686, 6 N. W. 1072; Burns v. Scoggin, 16 Fed. W. 326; Broadbent v. Brumback, 2 Idaho, 336, 16 Pac. 555; Lang v. Cadwell, 13 Mont. 458, 34 Pac. 957; Jevne v. Osgood, 57 Ill. 340; Munter v. Linn, 61 Ala. 492; Voechting v. Grau, 55 Wis. 312, 13 N. W. 230; Long v. Mjones v. Bank, 45 Minn. 335, 47 N. W. 1072; Insurance Co. v. Shields, 13 Phila. 407.

² Nathan v. Brand, 167 Ill. 607, 609, 47 N. E. 1071.

³ Woodland Bank v. Treadwell, 55 Cal. 879.

ascertain whether the attorney fee claimed has been paid, or whether the plaintiff is under obligation to pay it. By so doing he will be able to enforce such stipulations according to the true intent and meaning of the parties,— that is, to reimburse the plaintiff in any reasonable sum which he has paid, or is obligated to pay, for the services of an attorney in the foreclosure of the mortgage.¹

In a recent case the Illinois appellate court² held that, to justify an allowance of attorneys' fees in a foreclosure proceeding, it is not necessary for the proof to show that the complainant has "paid such fees or that he has become legally liable therefor;" that such rule applies to the assessment of damages upon the dissolution of an injunction and in some other cases, but that it has no application to a foreclosure case where the mortgage provides for attorneys' fees. While it may not be reversible error for the record to fail to show that the complainant has "paid such fees, or that he has become legally liable therefor," the presumption being in favor of honesty and fair dealing in the absence of a showing to the contrary, yet it is also true that the subject is a matter of legitimate inquiry in the master's office; and it is also true that no court will ever reverse the action of the master for seeking light upon the subject. If the master's effort in that direction results in showing "payment or legal liability," the complainant would have no reason to complain, while, on the other hand, if the master's effort results in the disclosure of an attempt on the part of the complainant to recover a sum in excess of the contract price between himself and his attorney, no court would ever listen to his contention that the master erred in not permitting him to carry out his purpose. In the discharge of this duty it must be kept in mind that the contract is, in some respects, a peculiar one. It is made between a borrower and a lender, at the moment when the want of the latter often puts him in the power of the former, for a payment in the nature of a penalty, with little, if any, expectation on the part of the borrower that the contingency upon which it is to

¹ *Rees v. Peltzer*, 1 Ill. App. 815; *Martin v. Jamison*, 89 Ill. App. 248; *Stinnett v. Wilson*, 19 Ill. App. 88; *Jevne v. Osgood*, 57 Ill. 340. *Rosenthal v. Boas*, 27 Ill. App. 480; ² *Wattson v. Jones*, 101 Ill. App. Zibell v. Barrett, 80 Ill. App. 112; 572.

become operative will ever happen. When made in good faith it concerns the amount of compensation to be paid to an officer of the court for professional services, such amount to be paid by the adverse party as a substitute for common-law "costs." Such a contract is, in some sense, under the power of the court, and ought not to be enforced except so far as it appears to be reasonable and just.¹

§ 646. Fixing the amount of attorneys' fees.—Having determined that the mortgagee is entitled to an allowance for attorneys' fees, the question is as to the amount to be allowed, and here it may be stated at the outset, that, whatever may be the form of the stipulation, it is the duty of the court to ascertain what is, and to allow only, a "reasonable fee." It makes no difference in this regard whether the stipulation contract provides for a specific sum, or simply stipulates for a reasonable fee, as, in either event, the duty of the court is precisely the same; that is, the amount allowed must be simply commensurate with the services rendered; not only this, but it must be for necessary services — the identical services provided for in the contract of the parties.² As nothing can be allowed as a gratuity, it follows that if any part of the services rendered, for which compensation is claimed, was unnecessary, it is the duty of the court to wholly ignore such services in fixing the amount to be allowed. The only difference between a case where the stipulation names a specific sum and one where the contract simply provides for a reasonable fee is this: In the former case the court may, without requiring the production of evidence, allow a reasonable fee;³ while, in the latter case, the burden of proof rests upon the party seeking the allowance, to establish by competent evidence what a reasonable fee is for the services rendered.⁴

In a recent Illinois case, where a specific fee was stipulated by the parties and allowed by the court, without any proof that the amount allowed was a reasonable fee for the services rendered, the court say: It was not necessary for the com-

¹ Burns v. Scoggin (U. S. Cir. Ct. D. N. E. 144; Dorn v. Ross, 177 Ill. 225, Oregon), 16 Fed. 734, 736. 52 N. E. 321; Thornton v. Commonwealth Ass'n, 181 Ill. 456, 54 N. E.

² Soles v. Sheppard, 99 Ill. 616.

³ McIntyre v. Yates, 104 Ill. 491; 1037.

Sweeney v. Kaufmann, 168 Ill. 233, 48

⁴ See ante, § 645

plainant to prove, in the first instance, that it was a proper compensation for the services of his attorney in foreclosing the mortgage. Where the parties expressly contract for a fixed amount as attorney's or solicitor's fee and that contract appears in evidence, it cannot be said that there is no proof of the reasonableness of such amount.¹

In the case of allowance of attorneys' fees the court has great discretion, it being held in some states that stipulations for a fixed attorney's fee in advance are against public policy and absolutely void,² while other courts have held that, no matter what form the stipulation may take, the allowance or disallowance of the fee is a matter purely within the discretion of the court.³ But, however this may be, one thing is certain, and that is, where the stipulation is for a specific sum, an allowance by the court of an amount in excess of the sum named is erroneous;⁴ but the amount in excess of the stipulated sum may be remitted, either before or after judgment, and the error thus cured.⁵ The amount of recovery is also limited by the amount claimed in the bill, it being error to allow a greater sum without an amendment.⁶

The amount named in the stipulation may be adopted by the court as the measure of compensation, but, where such amount is so large as to suggest that it is a mere device to secure illegal interest or some unconscionable advantage, the court should be slow to enforce the payment of it, and ought probably, upon slight additional evidence to that effect, to refuse to allow it, or reduce it to a reasonable sum. Borrowers and lenders seldom deal upon equal terms, and the necessities of the former often constrain them to accede to terms and conditions which are oppressive, in the vain hope that they will be able to meet their engagements promptly, and thereby avoid the payment

¹ *Dorn v. Ross*, 177 Ill. 225, 227, 52 N. E. 321.

² *Myer v. Hart*, 40 Mich. 517, 29 Am. R. 553; *Vosburgh v. Lay*, 45 Mich. 455; *Bendey v. Townsend*, 109 U. S. 665, 8 Sup. Ct. R. 482; *Bank v. Sevier*, 14 Fed. 662; *Peyser v. Cole*, 11 Ore. 39, 4 Pac. 520, 50 Am. R. 451; *Balfour v. Davis*, 14 Ore. 47, 12 Pac. 89; *Kimball v. Moir*, 15 Ore. 427, 15 Pac. 669.

³ *Moran v. Gardemeyer*, 82 Cal. 96,

23 Pac. 8; *Daly v. Maitland*, 88 Pa. St. 384, 32 Am. R. 457; *Lindley v. Ross*, 137 Pa. St. 629, 20 Atl. 944; *Wilson v. Ott*, 173 Pa. St. 253, 34 Atl. 28.

⁴ *Monroe v. Fohl*, 72 Cal. 568, 14 Pac. 514; *Palmeter v. Carey*, 68 Wis. 426, 21 N. W. 793.

⁵ *Killops v. Stephens*, 73 Wis. 111, 40 N. W. 652.

⁶ *Newburg v. Coyne*, 85 Ill. App. 74.

of the charges and penalties stipulated for in case of failure. It would, then, be better if such stipulations were not made for a fixed sum, or percentage, but rather for such sums as the court might judge reasonable and right. In any event, the sum named by the parties must be considered only as the maximum amount which can be allowed, and the attorney fee fixed only at such sum as will reimburse the plaintiff for his actual expenses incurred — enough to keep him “harmless.”¹

§ 647. Fixing the amount of attorneys' fees — Continued. In determining the amount of compensation to which an attorney is entitled in a particular case it is proper to take into consideration the professional skill and standing of the person employed, his experience, the nature of the controversy, both in regard to the amount involved and the character and nature of the questions raised in the case, as well as the result,² but, in taking into consideration the “result,” it is not proper to “go into an inquiry concerning prospective benefits which might accrue in the future.”³ While the amount involved in a given case may be large and the responsibility resting upon the attorney thereby increased, thus forming a proper element to be taken into consideration in estimating the amount of fee to be allowed, yet, while this may be true, it will frequently be found upon examination that the actual duties required were such as involved no great amount of either skill or responsibility, and, where such is the case, it must not be overlooked in fixing the compensation to be allowed. In passing upon a case of this character Mr. Justice Deady, of the federal court, says: “The defendants have done nothing to enhance the labor and responsibility of this proceeding. No subsequent mortgage has been made of the premises, or judgment suffered that might be a lien upon them, and thus compel the plaintiff to incur the expense and trouble of making additional parties to his bill. No opposition has been made to the enforcement of the mortgage, and all that the plaintiff is required to do to enable him to collect

¹ Burns v. Scoggin (U. S. Cir. Ct. D. Oregon), 16 Fed. 734, 738; Wilson S. M. Co. v. Moreno, 6 Sawy. 35; Bank of British N. A. v. Ellis, 6 Sawy. 96, 104, 2 Fed. 44.

² Eggleston v. Boardman, 37 Mich. 14; Haish v. Payson, 107 Ill. 365, 370.

³ Id.

his debt is simply to prepare and file a bill, and in due time take a decree of sale and distribution of the proceeds for want of an answer thereto. This service is quite simple and involves only the discharge of routine duties, for the most part merely clerical. Of course, the matter requires reasonable accuracy and attention to details,—such as dates, amounts, and descriptions of property,—while the comparatively large sum involved adds to the responsibility and anxiety of conducting the proceeding to a successful determination.”¹ Again, the amount involved may be large and “a good deal of time and labor” required, and yet “no intricate or abstruse questions calling for the exercise of great talents.” In such a case, though the attorney may stand at the head of his profession, these facts should be taken into consideration in fixing the amount of his compensation.²

In some cases an effort has been made to fix the amount to be allowed for attorneys' fees by comparison with judicial salaries. For example, Mr. Justice Deady, in a federal case, said: “In this state (Oregon) a judge of the circuit or supreme court is paid a salary of \$2,000 a year. His duties are usually more onerous and responsible than those of the attorney who conducts a case before him. And although this salary is generally regarded by the bar and business men of the community as grossly inadequate to the service and position, yet, in estimating the value of an attorney's services from judicial knowledge of such matters, it is proper to take into consideration the compensation provided by law for judicial services.”³ In a case in the Illinois supreme court, where the most extravagant estimates were placed upon the value of the services in question, that court could not refrain from drawing a comparison between such estimates and the salaries paid to the highest judicial officers in the country. The court said: “It is well known what standards of value are fixed for the services of judges of the supreme court of the United States and the courts

¹ Burns v. Scoggin (U. S. Cir. Ct. D. Oregon), 16 Fed. 734, 737.

² McMannomy v. C., D. & V. R. R. Co., 167 Ill. 497, 511, 47 N. E. 712. In this case the court say: “The questions involved in the foreclosure were simple. The intervening peti-

tions of creditors, so far as appears, involved nothing more than is usual in such cases, which is simply the auditing of accounts.”

³ Burns v. Scoggin (U. S. Cir. Ct. D. Oregon), 16 Fed. 734, 737.

of last resort in the several states, and, while the great rewards of professional life are not to be regarded as wholly pecuniary, yet the great disparity between the salaries of the highest judicial officers and such estimates as were here given by some of the witnesses as to the value of these is worthy of consideration."¹

§ 648. Fixing the amount of attorneys' fees — Continued — The evidence.— Before concluding it is proper to add some suggestions upon the evidence admissible under issues of this character. Some courts have attempted to draw a distinction between evidence as to the "usual and customary prices charged for similar services," and "opinions as to the value of legal services," but, to my mind, the difference is rather in the form of the question than otherwise, as certainly the reasonable value of legal services to the client would be the usual and customary charge for such services by persons competent to perform them,—the client could go into the market and contract for them at this price. But be this as it may, the courts recognize the distinction, designating one as a "matter of fact," and the other as purely "opinion evidence." In an early Illinois case the court laid down the rule as follows: "In fixing the amount of a reasonable fee, the examination should be directed to what is customary for such legal services where contracts have been made with persons competent to contract, and not what is reasonable, just and proper for the solicitor in the particular case. The inquiry should be, not what an attorney thinks is reasonable, but what is the usual charge."²

This method of practice, thus definitely laid down by the court of last resort, was for many years recognized as the proper course to be pursued, as the older members of the bar will remember, the line of questions in such cases being confined to "the usual and customary charges for similar services." In a later case, however, the court incidentally remarked that "In the present case, opinions may be received

¹ *McMannomy v. C. D. & V. R. R.* \$25,000 to \$150,000. For measurement of master's compensation by comparison with salaries paid to judges, see *ante*, § 638.
² *Reynolds v. McMillan*, 63 Ill. 46.

as to the value of the services;"¹ and in a still later case the same court, after quoting its previous holdings, distinctly recognizes the plaintiff's right to introduce evidence both as to the "usual and customary charges for similar services," and, also, the testimony of lawyers, who "may be asked their opinions as to the value of the legal services."² After quoting the language of the court in the Reynolds case, as given above, the court say: "It is held in a number of cases, that, in order to aid a jury in determining the reasonable worth of legal services, proof may be introduced of the price *usually* charged for similar services;"³ and then, quoting from the Haish case upon the other branch of the subject, add, "Opinions may be received as to the value of the services."⁴

Upon the distinction between these two methods of arriving at the same result, the consistency of the decisions of the courts holding the admissibility of both, and the necessity of admitting "opinion evidence" in a certain class of cases, the court, continuing, says: "It cannot be said that these two classes of decisions are inconsistent with each other. Where the professional service is of such a character that it has become usual and customary to make a certain charge for its performance, evidence should be given of the amount of such usual and customary charge. What is a usual and customary charge for a particular service is a question of fact; and, where a witness states what it is, even though he has learned it from his professional experience, he is testifying to a matter of fact, and not altogether as an expert. But, as to much of the legal work which is done for their clients by attorneys at law, there is no customary or established charge, especially where, as in this state, legal fees, except in amicable partition suits, are not the subject of statutory taxation. The value of legal services will

¹ Haish v. Payson (1883), 107 Ill. 365, 370.

² Louisville, N. A. & C. Ry. Co. v. Wallace (1891), 136 Ill. 87, 23 N. E. 493, 11 L. R. A. 787.

³ Citing Eggleston v. Boardman, 37 Mich. 14; Vilas v. Downer, 21 Vt. 419; Stanton v. Embrey, 93 U. S. 548.

⁴ The court further say: The admissibility of the opinions of witnesses experienced in such matters

for the purpose of showing the value of legal services was recognized by the supreme court of the United States in Forsyth v. Doolittle, 120 U. S. 73, 7 Sup. Ct. R. 408. To the same effect are Allis v. Day, 14 Minn. 516; Covey v. Campbell, 52 Ind. 157; Ottawa University v. Parkinson, 14 Kan. 159; Harnett v. Garvey, 66 N. Y. 641; Rose v. Spies, 44 Mo. 20; Thompson v. Boyle, 85 Pa. St. 477.

oftentimes depend on a variety of considerations, such as the skill and standing of the person employed, the nature of the controversy, the character of the questions at issue, the amount or importance of the subject-matter of the suit, the degree of responsibility involved in the management of the cause, the time and labor bestowed. For such services there can be no standard market price. There is no fixed standard by which their value can be determined. They manifestly come within the many exceptions to the general rule that the opinions of witnesses are not evidence. What is a fair and reasonable compensation for the professional services of a lawyer cannot, in many, if not in most, cases, be otherwise ascertained than by the opinions of members of the bar, who have become familiar, by experience and practice, with the character of such services. 'Practicing lawyers occupy the position of experts as to questions of this nature.'"¹

The question is one upon which from the nature of the case it is not practicable to furnish more definite evidence than the opinion of witnesses who show themselves qualified to form well grounded estimates of such value by their familiarity with the department of business in which such services have been rendered. Services performed by members of the legal profession fall within this principle. There is no fixed standard by which their value can be determined; their value and reasonable price vary with the magnitude and importance of the particular case, the degree of responsibility attaching to

¹ Louisville, N. A. & C. Ry. Co. v. Wallace, 136 Ill. 87, 23 N. E. 493, 11 L. R. A. 787. In a later case, Metheny v. Bohn (1897), 164 Ill. 495, the court quote approvingly from the Reynolds case, to the effect that the only competent evidence is that going to show "the usual and customary charges for like services," thus ignoring the competency of the evidence of attorneys as to what "in their opinion would be a reasonable compensation for the services rendered," but, on examination of the case, it will be found that this question was not before the court, and that no mention is made of the case

of Louisville, N. A. & C. R. Co. v. Wallace, 136 Ill. 87. The opinion, therefore, so far as it relates to the competency of the evidence, is entitled to no weight whatever. See also Nathan v. Brand, 167 Ill. 607, 47 N. E. 771. In the still later case of McManomy v. C., D. & V. R. R. Co. (1897), 167 Ill. 497, 47 N. E. 712, attorneys were sworn and examined at great length as to what in their opinion was a reasonable fee for the services in question, and such evidence was considered by the court, in determining what sum to allow as attorneys' fees, without a question as to its propriety.

its management, the difficulty of the questions involved, the ability and reputation of counsel engaged, the labor bestowed, and other matters which will readily occur to the profession. Practicing lawyers occupy the position of experts as to questions of this nature; from the character of their business they are not only in the habit of estimating the value of professional services, but they enjoy peculiar advantages for so doing; their opinions of such value should therefore be received, not only because they are qualified to form them, but because it appears to be impracticable to furnish any more satisfactory evidence.¹ "The very best means of adjusting this value are the opinions of those who, in earning and receiving compensation for them, have learned what legal services in their various grades are worth."²

It must also be kept in mind that, while opinions of attorneys are like those of experts in other cases, receivable and entitled to due weight, yet the master and the court are also well quali-

¹ *Allis v. Day*, 14 Minn. 516, 518, 519.

² *Thompson v. Boyle*, 35 Pa. St. 477, 480.

The proper practice, both as to the presentation and allowance of an attorney's fee in the master's office, as well as the preservation of the question for review by the chancellor, may be summarized as follows:

First. The claim must be made for such fee in the pleadings. *Ante*, § 645.

Second. The burden of proof rests upon the party claiming such fee to establish by competent evidence the existence of the conditions justifying its allowance. *Ante*, § 645.

Third. It is the duty of the claimant to see that the master passes upon the claim, and that his report shows the result—either its allowance or disallowance. See *ante*, § 286.

Fourth. In jurisdictions where objections are required to be filed with the master as to his findings of fact, it is the duty of the dissatisfied party to file a specific objection to the allowance or disallowance of the

claim, as the case may be, and also to see that the master passes upon such objection. *Haldeman v. Mass. Mut. Life Ins. Co.*, 120 Ill. 390, 393; *Cheltenham Improvement Co. v. Whitehead*, 128 Ill. 279, 21 N. E. 569. See *ante*, §§ 388, 418, 471, 472.

Fifth. The dissatisfied party, desiring to question the correctness of the master's action, must see that the evidence bearing upon the question of attorneys' fees is properly certified by the master and returned to the court with the master's report. *Goodwillie v. Millimann*, 56 Ill. 523; *Albright v. Smith*, 68 Ill. 181; *Spring v. Collector of Olney*, 78 Ill. 101; *Metheny v. Bohn*, 164 Ill. 495, 45 N. E. 1011; *Salomon v. Stoddard*, 107 Ill. App. 227; *Lange v. Heyer*, 195 Ill. 420, 63 N. E. 173. This is simply in accordance with the universal rule that a reviewing tribunal is powerless to pass upon a finding of fact unless the evidence upon which it is based is made a part of the record, and thus brought before the court. *Ante*, §§ 418, 471, 472, 529.

fied to form an independent judgment on such questions, and it is their duty to do so.¹ In a former section it is said that, where the question is as to the value of professional services, the master is not bound by the opinion of witnesses, but may exercise his own judgment on the subject, taking into consideration the nature of services, or time required to perform them, and all attendant circumstances. Such opinions are competent to assist the master in reaching a correct conclusion, but are not conclusive. If they were conclusive the reference to a jury or master would be an idle ceremony. There are innumerable instances where uncontradicted testimony of this character has been disregarded, and where, upon a conflict, the trial court has declined to follow the testimony offered on either side, and its action in this regard has been approved by the appellate courts.²

In estimating the weight to be given to such evidence it must be remembered that such opinions come from members of the same profession having an interest in the general subject; that they often rest largely upon vague and imaginative ideas as to the difficulty of the questions in the case, and mental anxiety engendered, the skill required, and the responsibility involved, and that they are so flexible as to be easily swayed by personal regard and by the opinion and wishes of the one making the charge. It is the duty, therefore, of the master and the court to see that due regard is given to the rights and interests of clients, and that the decree does not represent mere extravagant opinions of friendly attorneys as to what would be just and proper in a given case.³ Litigants have the right to expect that members of the bar will not demand, and that the courts will not allow, oppressive or excessive charges, which, being demanded by counsel under stipulations of this character, generally contained in mortgages, for "reasonable solicitor's fees to be fixed by the court," may often amount to obnoxious penalties.⁴ The almost utter worthlessness of such evi-

¹ Goodwillie v. Millmann, 56 Ill. 528; McMannomy v. C., D. & V. R. R. Co., 167 Ill. 497, 510, 47 N. E. 712; Metheny v. Bohn, 164 Ill. 495, 498, 45 N. E. 1011. examination, will be found to fully sustain the text.

³ McMannomy v. C., D. & V. R. R. Co., 167 Ill. 497, 510, 47 N. E. 712.

⁴ Stone v. Billings, 167 Ill. 170, 183, 47 N. E. 372.

² See *ante*, § 855, and authorities cited in notes thereto, which, upon

dence in many cases is shown by the extravagant opinions of the "experts" in the Illinois case cited below, in which the witnesses differed in their estimates of the value of the services in question to the extent of \$125,000, such estimates ranging all the way from \$25,000 to \$150,000. Some of the witnesses, doubtless for the time being believing what they said, stated upon the witness stand "that they would not contract to do the work for \$100,000."¹

While it is true, as said by Chief Justice Gibson of Pennsylvania, that "a lawyer charged with particular preparations for a lawsuit is not to be held responsible or paid as a porter or a shoemaker,"² yet, after listening to the fairy tales told by "friendly lawyers" upon the witness stand, of fortunes made in a single case as with a brush of Aladdin's lamp, returning from this dream-land and again becoming conscious of the hard realities of every-day professional life, we realize by contrast more forcibly than ever the truth, told by Daniel Webster at a dinner given in his honor by the Charleston bar, that the life-history of most great lawyers can be given in few words: "They live well, they work hard, they die poor."

¹ *McMannomy v. C., D. & V. R. R. Co.*, 167 Ill. 497, 47 N. E. 712.

² *Kentucky Bank v. Combs*, 7 Barr, 548; *Thompson v. Boyle*, 85 Pa. St. 477, 480.

INDEX OF SUBJECTS.

[NOTE.— To understand and appreciate the plan and scope of this work, one should carefully consult, in connection with this Index, the "Table of Contents," where the subject of every section is accurately given with its appropriate number, thus furnishing, as it actually does, a full, additional index to the contents of the volume.]

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